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Nos. 106, 169 and 170.

Brief of Sterry, Kenna & Dunlap for Appellees

IN THE

Supreme Court of the United States.

Filed Oct. 21, 1898.

OCTOBER TERM, A. D. 1898.

THE TERRITORY OF NEW MEXICO, *Appellant,* vs. THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W. SMITH, Receiver of the Property of the Atlantic and Pacific Railroad Company, *Appellees.*	Nos. 106, 169 and 170.

BRIEF OF APPELLEES.

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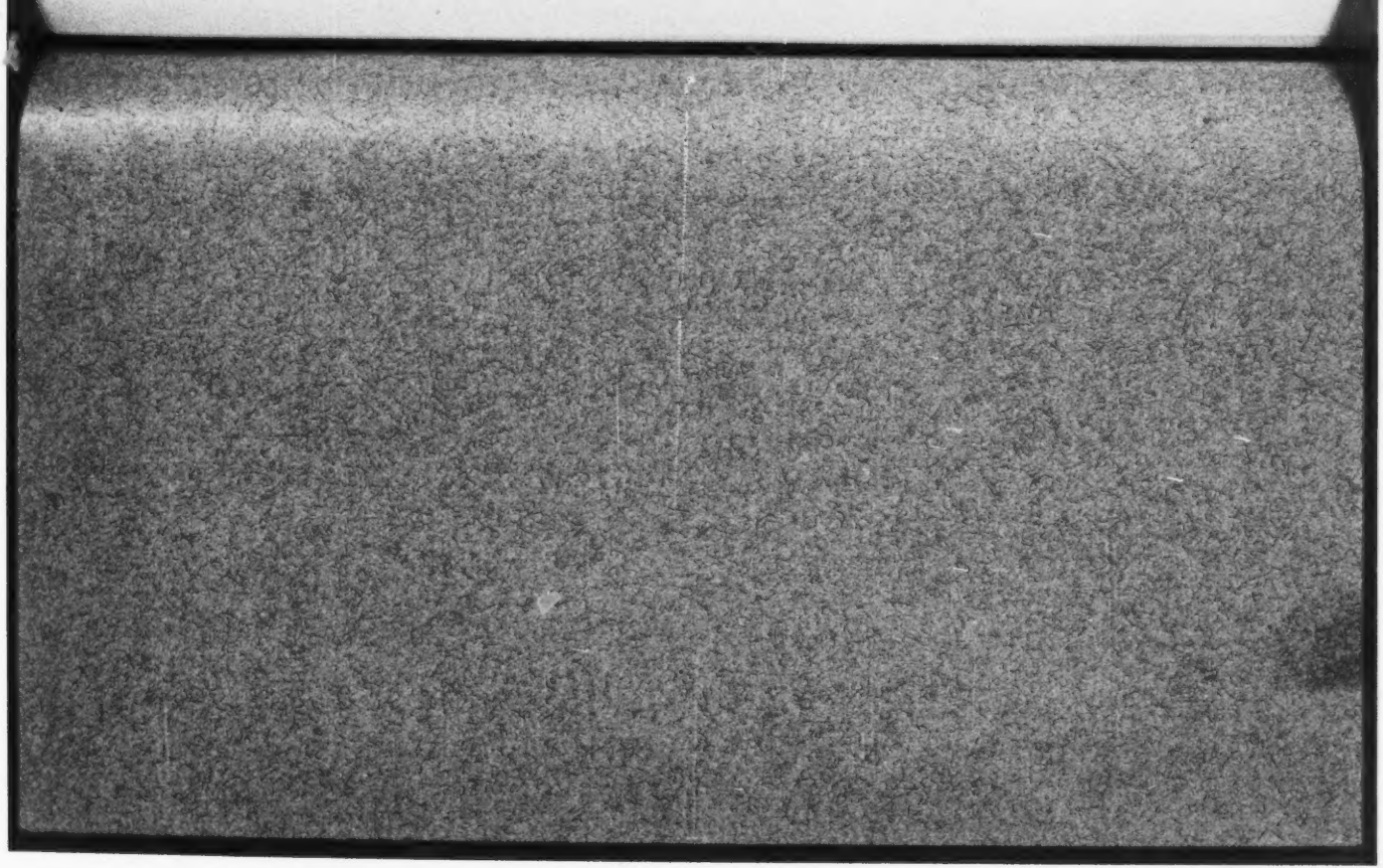

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BRIEF OF APPELLEES.

Statement of Case.

CASE NO. 106 (16,578).

The statement of this case made by the appellant is not satisfactory to us, and we therefore present to the Court the following as a more complete and detailed statement of the facts:

The Atlantic and Pacific Railroad Company was incorporated by the Act of Congress approved July 27, 1866 (14 U. S. Stat., p. 292), "to lay out, locate and construct, finish, maintain and enjoy a continuous railroad and telegraph line, with

the appurtenances, from a point at or near the town of Springfield, Missouri, to the Pacific Ocean, by way of the Canadian River, Albuquerque, Agua Frio, along the head waters of the Colorado Chiquito, and thence along the 35th parallel of latitude to the Colorado River, and from there, by the most practicable route, to the Pacific Ocean," and was invested "with all the powers, privileges and immunities necessary to carry into effect the purposes" expressed in the act.

By the second and seventh sections of the act, "a right of way" was granted to and authorized to be acquired by the company for its railroad, telegraph line and station buildings etc., and this "right of way" was, by the express terms of the act, to be exempt from taxation in the territories of the United States. Under this act the Atlantic and Pacific Railroad Company, prior to 1880, located its line of road through Bernalillo and Valencia Counties, in the Territory of New Mexico, including "all necessary grounds for station buildings, workshops, depots, machine shops, switches, turntables, water stations," side tracks, etc. Subsequently, between 1880 and 1881, the railroad company constructed its line of railroad in New Mexico from Isleta Junction, New Mexico (a junction point with the Atchison, Topeka and Santa Fe Railroad Company, and about fifteen miles west of Albuquerque), to and across the Colorado River, a distance of about five hundred and sixty miles. That part of the railroad constructed in New Mexico was built on the line of definite location previously made, and 73 miles and 142 feet of it was situated in Bernalillo County, and 93 miles and 458 feet of it was situated in Valencia County. These are the only counties in New Mexico touched by the constructed portion of the line.

In January, 1894, receivers were appointed to take possession of the entire property of the Atlantic and Pacific Railroad Company in New Mexico, Arizona and California, in actions

commenced in the three jurisdictions, to foreclose a second mortgage executed by the company. Subsequently, in the fall of 1895, an additional foreclosure suit against the company was brought in each of these jurisdictions by the United States Trust Company, trustee under the first mortgage, executed by the Atlantic and Pacific Railroad Company, and in this last suit orders were made extending the existing receivership to this latter foreclosure suit.

The Atlantic and Pacific Railroad Company, up to January, 1895, and the receivers from time to time, until 1896, made returns to the assessors of Bernalillo and Valencia Counties of all the property of the railroad company subject to taxation in these counties, as required by the provisions of Section 2822 of the Compiled Laws of New Mexico, which is hereafter set out. These returns omitted the "right of way," including station grounds, etc., and the superstructure thereon, under the claim of the railroad company, and of the receivers, that the same was exempt from taxation in the Territory of New Mexico by virtue of the provisions of the second section of the act of July 27, 1866. The returns made by the railroad company in 1893, and by the receivers in 1894 and 1895, to the assessor of Bernalillo County, appear on pages 35 to 41, inclusive, of the transcript in case No. 106.

In 1895 the Board of County Commissioners of Bernalillo County directed the county assessor to place upon the assessment rolls of that county for that year an assessment of the entire superstructure of the railroad company, placed upon and permanently attached to its "right of way" in that county, at a value to be assessed by him for the year 1893, with an added penalty of one-fourth in value, upon the theory that it had been omitted for the year 1893 from the rolls. It also ordered to be placed upon the assessment rolls of that county, for the year 1894, the same property, with an added penalty of one-fourth in value, upon the same theory. It also ordered him to place upon the assessment rolls of that year

an assessment of the same property for the year 1895, with an added penalty of one-fourth in value of such assessment. The assessor, acting under these instructions, made such additional assessments, which were entered upon the assessment rolls of that county for the year 1895, so that the assessments for that year consisted of an assessment for the year 1893, an assessment for the year 1894, and an assessment for the year 1895, of the property claimed to be exempt, each of which was called an additional assessment for the year for which it was made. Copies of the assessment rolls, as they were made up by the assessor, under instructions from the board, and containing the original and additional assessments, are shown in the transcript in case No. 106, on pages 42 and 43. The total amount of the taxes levied against the assessments placed upon the rolls by the assessor, in addition to the taxes levied upon the property returned by the railroad company for the year 1893 and by the receivers for the years 1894 and 1895, amounted to the sum of $43,254.70, including $12,978 for the year 1893, $12,768.78 for the year 1894 and $16,585.14 for the year 1895.

On March 12, 1896, the Territory of New Mexico, through the District Attorney for the Second Judicial District, filed an intervening petition in the foreclosure suit brought by the United States Trust Company of New York against the Atlantic and Pacific Railroad Company *et al.*, asking to have the amount of taxes levied upon these additional assessments ordered paid by the receiver (Tr., 31–43). Upon the filing of this petition, an order to show cause was issued by the Court requiring the United States Trust Company, the Mercantile Trust Company (the second mortgagee) and the other defendants, together with the receiver, to show cause why the order asked for by the intervening petition should not be granted. Subsequently, the United States Trust Company and the receiver filed separate answers to this intervening petition (Tr., 44–50).

On the 28th of May, 1896, an agreed statement of facts was

filed in the case, which appears on pages 50 to 55 of the transcript (Tr., 50–55), and which we here insert for convenience.

AGREED STATEMENT OF FACTS.

" For the purposes of the hearing to be had upon the intervening petition of the Territory of New Mexico, in the above-entitled cause, and answers thereto of C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company, and the United States Trust Company, it is hereby stipulated and agreed, by and between said above-named parties, that the following facts shall be accepted and received by the judge or court in determining the questions involved as the facts in the case.

" That on and prior to January 1, 1892, the Atlantic and Pacific Railroad Company, under the provisions of its charter, definitely located its line of road and right of way through Bernalillo County, which said right of way so located involved all necessary grounds for station buildings, work shops, depots, machine shops, switches, side-tracks, turn-tables and water stations. That upon said right of way so located through the City of Albuquerque, in said county, was definitely located necessary grounds for station buildings, work shops, depots, machine shops, side tracks, turn-tables and water stations; and there was also located upon said right of way at the Atlantic and Pacific Junction, at Chaves or Mitchell, at Coolidge, at Wingate, at Gallup and at Manuelito, necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn-tables and water stations.

" That thereafterwards and prior to 1893 there was built and constructed upon said right of way by the Atlantic and Pacific Railroad Company from a point of junction with the Atchison, Topeka and Santa Fe Railroad Company at Isleta, fifteen miles south of Albuquerque, a railroad along said right of way, from said junction point to the Colorado river, in the Territory of Arizona; that the Atlantic and Pacific Railroad Company has, under an agreement with the Atchison, Topeka and Santa Fe Railroad Company, occupied and used the tracks of the last named company between the junction of the two railroads at Isleta and the City of Albuquerque as and for the railroad of the Atlantic and Pacific Railroad Company to the extent that its business required the use and operation of such railroad for itself; or in other words, under contract between the two companies the railroad of the Atchison, Topeka and Santa Fe Railroad Company through the City of Albuquerque to the junction at Isleta, a distance of about fifteen miles, is jointly used by the two railroad companies; said railroad running through the reservations for machine shops, etc., afore-

said, of the Atlantic and Pacific Railroad Company at Albuquerque; that the right of way so located by the Atlantic and Pacific Railroad Company and upon which it built its railroad, as aforesaid, runs through Bernalillo County, and is situated in Bernalillo County as follows:

"Commencing at the A. & P. Junction referred to, it runs thence in a westerly direction 4 miles 3,780 feet to the division line between Bernalillo County and Valencia County, and then after crossing a portion of Valencia County at a point known as Station 5,247 it again runs through Bernalillo County 68 miles and 44 feet to the west line of the County of Bernalillo, being the west line of the Territory of New Mexico; which said right of way, outside of the reservation for station grounds, etc., was located, and is of the width of 200 feet, being 100 feet on each side of the center of the railroad track located thereon.

"That in due time the former receivers of the property of the Atlantic and Pacific Railroad Company appointed by this court returned to the assessor of Bernalillo County as property belonging to said railroad company, taxable in said county, certain property, which was and is described in said returns as follows, to wit:

"List of personal property belonging to, claimed by, or in the possession or under the control of the receivers of the Atlantic and Pacific Railroad Company (Western Division), a corporation created by act of Congress, having its principal place of business at Albuquerque, New Mexico.

"The line of its road running through the Counties of Bernalillo and Valencia in said Territory of New Mexico; thence through the Counties of Apache, Navajo, Coconino, Yavapai and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the Counties of San Bernardino and Kern, in said state, to the western end of said line, and its terminus at Mojave, in said County of Kern, a total distance of 805.86 miles, the total mileage of said line owned by said company in said Territory of New Mexico being 166.6, of which 73.142 are in Bernalillo County, and 93.458 miles are in Valencia County.

"And the receivers of the property of said company make a full report of all of its personal property as follows, to wit:

"All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars, hand cars and all other equipments owned, possessed or used by said receivers or said company upon the entire line aforesaid	$452,960
"Track tools, and all other personal property not having its situs or domicile in some other State or Territory, including office and station furniture, law	

library, books, stationery, supplies and material, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup and Manuelito	78,000
" Personal property within the city limits of Albuquerque	200,000
" Personal property within the city limits of Gallup	5,000

" That the above and foregoing was all the property returned for taxation in Bernalillo County b said receivers or by the railroad company itself; and that the same was made as the assignment of the property of said company subject to taxation in said county for the year A. D. 1895; that the county assessor of Bernalillo County in the year 1895, under the direction of the Board of County Commissioners of said county, placed on the assessment roll an assessment of property against the Atlantic and Pacific Railroad Company for the year 1893. A true and correct copy of the assessment roll showing such assessment so placed thereon is filed with this as a part hereof, and as 'Exhibit 1,' which said exhibit shows the taxes levied, together with the values and penalties. That at the time the said assessor, under the instructions of said Board, placed upon said assessment roll certain property claimed to be taxable property belonging to said railroad company, which was omitted from taxation for the year 1894. A true and correct copy of the assessment so made is shown by 'Exhibit 2' herewith filed and made a part hereof.

" That the said assessor at the same time placed upon said assessment roll property claimed to have been omitted and belonging to said company for the year 1895, a true and correct copy of which said assessment roll, with said last-named assessment placed upon it, is shown by 'Exhibit 3,' hereto attached and made a part hereof and filed herewith.

" That these exhibits show precisely the descriptions of property entered by the assessor, the penalties added and the values and also the taxes levied thereon. 'Exhibit 3' also shows the description of the property as returned by the receivers.

" That all the property so placed upon the assessment roll by the assessor, outside of that returned by the receivers, was placed upon said assessment roll without the knowledge or consent of the receivers, or of said railroad company; that the entire property placed upon the assessment roll by said assessor, outside of the property returned by the receivers, constituted and constitutes an actual part and portion of the roadbed and railroad track thereon, situated on the right of way of the Atlantic and Pacific Railroad Company in Bernalillo County, in the Territory of New Mexico, and constitutes the railroad used and occupied by the Atlantic and Pacific Railroad Company under its charter and in accordance with the

provisions thereof; and the machine shops, station buildings, water tanks, section houses and other buildings of like character connected with and a part of the machinery used in the operation of said railroad; that each and every item of property described in the assessments so placed upon the said assessment roll, outside of the property returned by the receivers, is property that is actually and permanently attached to the right of way and station grounds of the Atlantic and Pacific Railroad Company, and constitutes an actual part and portion of the superstructure placed upon said right of way by said railroad company for its railroad and for its machine shops, turn-tables, side tracks, switches, water tanks, station buildings and other buildings of the same class and character actually used and needed in the operation of said railroad, and that no part of the same was, at the time of the placing of said assessments upon said assessment rolls by the assessor, detached from the actual right of way and station grounds of said railroad company; but, on the contrary, was firmly affixed thereto; that it was described as it was by the assessor in placing the same upon the assessment roll for the purpose of escaping the exemption from taxation contained in the second section of the act of Congress approved July 27, 1866, known as the charter of the Atlantic and Pacific Railroad Company, the assessor desiring to assess everything placed on the right of way separate from the right of way, no matter how permanently attached and affixed to the right of way.

"That during the year 1893 there were no receivers in possession of said property, and that said railroad was being operated by the railroad company itself, and, if any property was omitted to be returned for taxation which ought to have been returned to the assessor of Bernalillo County, it was the fault and neglect of the railroad company itself, and not the fault and neglect of the receivers afterwards appointed.

"That at Albuquerque upon the reservations and station grounds, there were situated the largest machine shops of the said railroad company, the general office building and such buildings as pertain to the headquarters of a railroad company; said buildings and reservation constitute the headquarters of the Western Division of the Atlantic and Pacific Railroad Company, and, since the appointment of receivers, of the receivers operating the same."

"That the assessor, in placing each of these three assessments upon the assessment rolls as stated, added to the actual value of the property one-fourth of such value, as a penalty for the failure on the part of the receiver to return such property for taxation.

"That in 1893 the railroad company, and in 1894 and 1895 the receivers, omitted all property that was firmly and fixedly attached to the right of way of said railroad company and to

station grounds, under the honest belief that the same constituted a part of the right of way and was exempt from taxation."

Subsequently the case came on to be heard, upon the intervening petition of the Territory and the answer thereto of the United States Trust Company and of the receiver, C. W. Smith and the agreed statement of facts (Tr., 31-42, 43, 44-51). Upon the hearing the Judge of the District Court ordered the receiver to pay to the treasurer of the County of Bernalillo the sum of forty-three thousand two hundred and fifty-four dollars and seventy cents ($43,254.70), the amount ascertained by a special master to be the aggregate of the taxes levied upon the additional assessments and penalties (Tr., 58, 59). An appeal was taken from this order by the United States Trust Company, and also by the receiver, C. W. Smith, who had obtained from the Court permission to take such an appeal (Tr., 59). The order appealed from was reversed upon hearing before the Supreme Court of the Territory, the Court determining that the additional assessments placed upon the rolls were illegal and void (Tr., 64, 65). An application was made for a rehearing, which the Court denied (Tr., 54-66). The decision of the Supreme Court was made December 18, 1896 (Tr., 62), and the opinion of the Court, delivered by the Chief-Justice, may be found upon pages 69 to 79 of the transcript.

CASE NO. 169 (16,171).

June 10, 1897, after the decision of the Supreme Court, the Territory filed in the District Court, in the same foreclosure action, another intervening petition, to recover taxes assessed and levied on the superstructure attached to the "right of way" of the railroad company in Valencia County (Tr., 16,671, pp. 30-32, inclusive, and 80-86). This intervening petition prayed for an order upon the receiver to pay thirteen thousand five hundred and eighty-six dollars and fifty-four cents ($13,586.54)

levied for taxes of 1892; twenty-three thousand and sixty-four dollars and sixty-three cents ($23,064.63) levied for taxes of 1893; twenty-three thousand and twenty dollars and sixteen cents ($23,020.16) levied for taxes of 1894; twenty-three thousand and twenty dollars and sixteen cents ($23,020.16) levied for taxes of 1895, and twenty-four thousand two hundred and seventy two dollars and ninety-two cents ($24,272.92) levied for taxes of 1896. The petition and exhibits disclose that the taxes sought to be recovered were based on assessments of the permanent structure on the "right of way" of the Atlantic and Pacific Railroad Company in the County of Valencia, and that the same questions were raised thereby as were involved in the first case herein, except that the assessments covered two years, 1892 and 1893, prior to the receivership, instead of one year, as in the prior case.

An order to show cause was issued and served upon the Mercantile Trust Company, the United States Trust Company and the receiver, and thereupon the United States Trust Company and the receiver filed five joint and several pleas to the intervening petition (Tr., 35–37).

Subsequently, at a hearing on the 23d day of June, 1897, the Court determined that the intervening petition (Tr., 30, 31) and exhibits (Tr., 80–86) disclosed a state of facts bringing the case within the decision of the Supreme Court in the prior case, and therefore dismissed the petition. From this order the Territory appealed to the Supreme Court, which, in August, 1897, affirmed the order of the District Court, upon the authority of its decision in the prior case.

CASE NO. 170 (16,672).

On June 10, 1897, in the same foreclosure suit, the Territory filed another intervening petition to recover taxes levied upon the assessment by the assessor in 1896 of the permanent structure upon the "right of way" of the Atlantic and Pacific Railroad Company in Bernalillo County, the amount thereof being sixteen thousand eight hundred and sixty dollars and sixty-one cents ($16,860.61) (Tr., 30-32). Orders to show cause were issued, and the United States Trust Company and the receiver, C. W. Smith filed a joint and several plea to the petition (Tr., 33-36). Upon a hearing, the District Judge found that the assessment was of the permanent structure and dismissed the petition (Tr., 36). An appeal was taken from this order by the Territory to the Supreme Court which, in August 1897, affirmed the order of the District Court (Tr., 40).

POINTS, AUTHORITIES AND ARGUMENTS.

FIRST POINT

From the terms of the act approved July 27th, 1866, read in the light of the history of the times when it was passed, it is clear that Congress intended to prohibit each one of the Territories through which it might pass from interfering by way of taxation with the railroad it was seeking to have built.

I.

In 1862 Congress passed the Union Pacific Act (12 Stat. at Large, 488). Congress subsequently amended this act several

times. By the terms of the original act and its amendments the Union Pacific and the other railroads mentioned in the act were given large subsidies in the way of the loan of millions of dollars, and of actually larger land grants than were given by Congress to any of the other railroads afterwards created by it.

In 1864, prior to completion of the Union Pacific, Congress created the Northern Pacific to build a line of railroad from Lake Superior to Puget Sound (3d Stat. at Large, 365).

Prior to the completion of the Union Pacific, and before work on the Northern Pacific was commenced, this Act of July 27th, 1866 was passed. It has been said that the passage of the Union Pacific Act was largely influenced by fear of a war with Great Britain, and it is equally proper to say that the passage of the Northern Pacific and Atlantic and Pacific Acts were equally influenced by fear of a war with France growing out of the attempt of the Emperor Napoleon to maintain Maximilian as Emperor of Mexico by a French army. Of course, there were many other considerations of public policy which brought about the passage of each of these acts, and which must be considered in any attempt to determine the full intention of Congress with respect to the railroads to be built under their provisions.

Many of the reasons inducing the passage of the Union Pacific Act are so applicable to and so fully explain the charters of the Northern Pacific and of the Atlantic and Pacific, and are so clearly and forcibly stated by Mr. Justice DAVIS in delivering the opinion of this Court in the case of the U. S. vs. U. P. R. R. Co. (91 U. S., 72), that we quote from it at length. (The italics are ours.)

"Courts, in construing a statute, may with propriety recur to the history of the times when it was passed, and this is frequently necessary in order to ascertain the reason, as well as the meaning of particular provisions in it.

"Many of the provisions in the original Act of 1862 are outside of the usual course of legislative action concerning

grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress, and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but even if this fear was groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true the threatened danger was happily averted, but wisdom pointed out the necessity of making suitable provision for the future. *This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the Government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and, so strong and pervading was this opinion, that it is by no means certain that the people would not have justified Congress if it had departed from the then settled policy of the country regarding works of internal improvement, and charged the government itself with the direct execution of the enterprise. This enterprise was viewed as a national undertaking for national purposes, and the public mind was directed to the end in view rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento Rivers which was practically worthless without the facilities afforded by a railroad, for the transportation of persons and property. With its construction, the agriculture and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the transportation of the mails and of supplies for the army, and the Indians.*

"*It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable.* * * *

"*Congress acted with reference to the state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private ends; and the prevalent opinion was that it could not be worked out by private capital*

alone. It was a national work, originating in national necessities and requiring national assistance.

"The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements. Congress undertook to do this, in order to promote the construction and operation of a work deemed essential to the security of great public interests.

"It is true, the scheme contemplated profit to individuals, for without a reasonable expectation of this capital could not be obtained, nor the requisite skill and enterprise. *But this consideration does not in itself change the relation of the parties to this suit.* This might have been so if the government had incorporated a company to advance private interests and had agreed to aid it on account of the supposed incidental advantages which the public would derive from the completion of the projected railway. *But the primary object of the government was to advance its own interests, and it endeavored to engage individual co-operation as a means to an end, the securing a road which could be used for its own purposes. The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself, viewed in the light of contemporaneous history.*"

See, also,

W. & St. P. R. R. Co. vs. Barney et al., 113 U. S., 618.
M. K. & T. R. R. Co. vs. K. P. R. R. Co., 97 U. S., 491.
U. S. vs. S. P. R. R. Co., 146 U. S., 570.
U. S. vs. D. & R. G. R. R. Co., 150 U. S., 1.
Wisconsin R. R. Co. vs. Forsyth, 159 U. S., 55.

The railroad to be built under the provisions of the Act of July 27th, 1866, was not only to have impressed upon it the usual and ordinary public functions and duties pertaining to railroads generally, but in addition thereto was to have impressed upon it the character of a national highway which the Government of the United States should at all times and forever have the free right to use in the way of running trains and cars upon terms to be fixed by it. For the convenience of the Court and to show how clear was the intent of Congress, and how applicable are the remarks of Judge DAVIS,

supra, we quote from Sections 1, 2, 3, 5, 7, 8, 9, 10, 11 and 20 of the act as follows :

"SEC. 1. * * * And said corporation is hereby authorized and empowered to lay out, locate and construct, furnish, maintain and enjoy a continuous railroad and telegraph line, with the appurtenances, namely: Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said state, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian river; thence to the town of Albuquerque, on the River Del Norte, and thence, by way of the Agua Frio or other suitable pass, to the head waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific. The said company shall have the right to construct a branch from the point at which the road strikes the Canadian river eastwardly, along the most suitable route as selected, to a point in the western boundary line of Arkansas at or near the town of Van Buren. And the said company is hereby vested with all the powers, privileges and immunities necessary to carry into effect the purposes of this act as herein set forth."

"SEC. 2. *And be it further enacted*, that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn tables and water stations; and the right of way shall be exempt from taxation within the territories of the United States." * * *

"SEC. 3. *And be it further enacted*, That there be and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of

said railroad line, as said company may adopt through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections and not including the reserved numbers. * * *"

"SEC. 5. *And be it further enacted*, That said Atlantic and Pacific Railroad shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turn-outs, stations and watering-places, and all other appurtenances, including furniture and rolling stock, equal in all respects to railroads of the first-class when prepared for business, with rails of the best quality, manufactured from American iron. And a uniform gauge shall be established throughout the entire length of the road. And there shall be constructed a telegraph line, of the most substantial and approved description, to be operated along the entire line. * * *"

"SEC. 7. *And be it further enacted*, That the said Atlantic and Pacific Railroad Company be, and is hereby, authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road not exceeding in width one hundred feet on each side of the line of its railroad, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turn-outs, standing places for cars, depots, station houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners who may be appointed upon application by either party to any

court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. And upon return into court of such appraisement, and upon the payment into the same of the estimated value of the premises taken for the use and benefit of the owner thereof, said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid." * * *

"SEC. 8. *And be it further enacted*, That each and every grant, right and privilege herein are so made and given to and accepted by said Atlantic and Pacific Railroad Company, upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the president, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish and complete the main line of the whole road by the fourth day of July, Anno Domini eighteen hundred and seventy-eight.

"SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of said road.

"SEC. 10. *And be it further enacted*, That all people of the United States shall have the right to subscribe to the stock of the Atlantic and Pacific Railroad Company until the whole capital named in this act of incorporation is taken up by complying with the terms of subscription.

"SEC. 11. *And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation.

* * * * * *

"SEC 20. *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times, but particularly in time of war, the use and benefits of the same for postal, military and other purposes, Congress may at any time, having due re-

gard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend or repeal this act."

Under the decision of this Court in the case of Lake Superior and M. R. R. Company vs. United States (93 U. S., 442), the Eleventh Section of the act must be construed as reserving to the Government of the United States the right to use the constructed railroad for the passage of its trains and cars at any and all times upon such terms as Congress might choose to make. This reservation created an easement in the railroad for all time to come in favor of the Goverment.

Regardless of the exemption contained in the act, it would seem that if this railroad, when completed, was to become such a national highway as the act itself evidently intended it to become, it would be greatly against public policy to permit a mere municipal corporation of the United States like a Territory to interfere with it by taxation and thus give to such municipal corporation the power to destroy it. Congress, however, determined not to leave this question open, and, hence, in the second section of the act, expressly prohibited not only the territories but itself from exercising the right of taxation of the right of way within such territories.

II.

The condition of the country over which this road was to be built will be presumed to have been known to Congress at the time of the passage of the act. The right of way from Springfield, Missouri, by way of Albuquerque and the Colorado River, and from there on by the 35th parallel of latitude to the Pacific Ocean, would pass through portions of two States and three Territories. From 350 to 500 miles of line was to be through the Indian Territory where the grant of land in aid of the construction of this road was inoperative.

From 800 to 1,000 miles of this line would pass through those portions of the Territories of New Mexico and Arizona which were and still are the most arid and mountainous parts of these Territories. In each of these Territories the line would necessarily have to pass over a country that would not, as a rule, give any local support for the operation of the railroad when constructed. Of course, in each of these Territories, along the line fixed by Congress, there were many beautiful and fertile valleys, but the general character of the country precluded any thought or belief on the part of Congress, or of the persons named in the Articles of Incorporation that the railroad contemplated by the act would ever derive sufficient local traffic to pay operating expenses through these two Territories or either of them. In fact, a large portion of this 800 or 1,000 miles was almost as barren a desert as the 300 or 400 miles that was to be traversed by the road west of the Colorado River.

In view of the knowledge Congress had of these facts, it seems incredible to suppose that Congress intended to offer as an inducement to capitalists to put money into the building of this national line of railroad the exemption of merely the bare strip of desert and arid land, which is embraced within the limits of the " right of way ", and which was not then, and never could be, of any substantial value for purposes of assessment and taxation.

The first Section of the Act named as incorporators over one hundred and fifty men residing in twenty-five different States and five different Territories, among whom were many whose names will be recalled by this Court as the names of men who had at that time national reputations as statesmen, soldiers, financiers and railroad men. The Act did not authorize the company to issue any bonds to be secured by a mortgage. Congress by its selection of the names of these prominent men scattered from the Atlantic to the Pacific Ocean intended to procure, if possible, a popular national subscription. Congress in express terms said that

every citizen in the United States should have the right to subscribe for this stock. It was at a time in the history of this country when the people living in those States from which the incorporators were chosen were extremely loyal to the national government and also to the belief that it should be a strong government. Money was easy in those days and it is more than probable that Congress believed, owing to the then apparent success of the Union Pacific undertaking, that capital would be forthcoming without further governmental aid, to accomplish this great work if it placed men of sufficient character at the head of it to induce the confidence of the people in their integrity.

Counsel for appellant asserts on the last page of his brief that Congress gave with an extremely liberal hand a donation of 50,000,000 acres of the public domain to this company, and that, therefore, it could not have intended to give very much more. In making this statement counsel overlooked the fact that the grant of land in Missouri and in the Indian Territory was inoperative. It must be remembered that Congress was not giving this land as a mere gratuity, but giving it as a portion of its contribution towards the building of this great public highway in which it was to have a special use and interest, and over which it reserved absolute control.

In this connection it is important to remember that while Congress under the provisions of Section Eight, Article One, of the Constitution of the United States, as construed by this Court, had a clear right to exempt this right of way from taxation in the States in which it was to be located. If Congress had intended to exempt merely the strip of land itself separate and apart from the superstructure to be placed thereon it would undoubtedly have exempted the right of way in the States as well as in the Territories, as such exemption would have been of so little value for assessment and taxation that it would not have affected the revenue of any community in which such right of way might be located. If, however, Con-

gress intended to exempt the completed railroad, then there were many reasons why it confined this exemption to the Territories over which its jurisdiction was undoubted.

SECOND POINT.

It must be presumed that Congress knew the rule of the common law that fixtures attached to the freehold become a part thereof, and intended that this rule should apply to fixtures to be placed by the railroad company upon its right of way, so that such fixtures would become as completely a part of the right of way as the soil, the rocks and the trees composing the same at the time of the grant thereof.

I.

This rule of the common law has been universally applied by text writers and Courts, to permanent structures placed upon the "right of way" for the purpose of making a completed railroad. In Washburn on Real Property, Chapter 1, Vol. 1 (4th Ed.), Paragraph 3, the author states the rule as follows:

"Land is always regarded as real property, and, ordinarily, whatever is erected or growing upon it, as well as whatever is contained within it or beneath its surface, such as minerals and the like, upon the principle that *cujus est solum ejus est usque ad cœlum* in one direction and *usque ad orcum* in the other. Thus the roadbed, the rails fastened to it, and the buildings at the depots of railroads, are real property. And the rolling stock of railroads has been held to be a fixture to such real property."

We quote from Vol. 1 of Rorer on Railroads, pages 9 and 10, as follows:

"LEGAL STATUS OF RAILROADS AS PROPERTY.—Whether we regard the structures of railroads which are permanent fixtures upon the soil, and their rolling stock and required appliances for operating them, as an entirety, or not, yet according to the most approved definition, the roadbeds, ties, rails, turnouts, depots, depot-houses or station-houses, water-tanks, and all other fixtures, come within the definition of real property, and are to be regarded as such; for lands comprehend all things of a permanent and substantial nature, and things real usually consist of lands, tenements or hereditaments. Thus real property or lands legally include all houses and other buildings and structures thereon erected or situated.

* * * * * *

"There is no doubt about the road structure itself, and permanent erections, houses and attachments, being real property."

Judge Elliot in his recent work on Railroads, Vol. 1, paragraph 31, states the proposition as follows:

"RAILROADS AS PROPERTY.—All property essential to the operation of a railroad, including the right of way, roadbed, ties, rails, side tracks, switches, depots, station houses, water tanks, and other fixtures, together with the rolling stock and other necessary movable appliances, has been held by the Federal Courts to be real estate. The same ruling is made by the Courts of many States, in some of which the character of rolling stock as property is fixed by statute. In those States in which the subject is uncontrolled by statute, the preponderance of authority is to the effect that only the land owned by the railroad company, together with the ties, rails and other structures permanently affixed thereto, is realty; and that engines, cars and other movable appliances are to be regarded for most purposes as personalty."

This Court in the case of *Galveston Railroad vs. Cowdry*, 11 Wall., 459, had occasion to consider the character of the permanent structure of a railroad which is affixed to the realty, and, speaking through Justice BRADLEY, states the proposition as follows:

"By the common law it is an inflexible rule that whatever is affixed to the freehold becomes a part of the realty, except certain fixtures erected by tenants, which do not affect the

question here. The rails put down on the company's road become a part of the road."

In the case of the *United States vs. The New Orleans R. R.* (12 Wall., 362), this Court, speaking through Justice BRADLEY, uses the following language in respect to this question:

"Had the property sold by the government to the railroad company been rails, as in the case of *Galveston Railroad vs. Cowdrey*, or any other material which became affixed to and a part of the principal thing, the result would have been different."

Porter vs. Pittsburg Bessemer Steel Co. (120 U. S., 649) was a case in which a mortgage upon a railroad had been foreclosed in the court below, but the Court, in its decree of foreclosure, determined that certain other claims, among them the claim of the Smith Bridge Company, were liens prior to the mortgage, and the mortgage was subject to these liens. This Court in that case reversed the decision of the Court below in so far as its decree determined that these claims were liens on the railroad property prior to that of the mortgage foreclosed. Upon the case again being brought before this Court, upon a petition for a rehearing (*Porter vs. Pittsburg Bessemer Steel Co.*, 122 U. S., 267), the Smith Bridge Company insisted that its claim, being for bridges conditionally sold to the railroad company, under agreement that the bridge company should remain the owner of the bridges until the contract price was fully paid, the placing of the bridges in the roadbed of the railroad company did not divest the bridge company of the title, and that the title still remained in the bridge company, and, consequently, the mortgage became a lien on the bridges only as the bridges became the rightful and legal property of the railroad company. The Court, answering that contention, speaking through Justice BLATCHFORD, says:

"The bridges became a part of the permanent structure of the railroad, as much so as the rails laid upon the bridges, or upon the railroad outside of the bridges. Whatever is the

rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company covering after-acquired property, it is well settled in the decisions of this Court that rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held, by the lien of such mortgage, in favor of *bona fide* creditors as against any contract between the furnisher of the property and the railroad company containing stipulations like those in the contracts in the present case (*Dunning vs. Railway Co.*, 1 Wall., 254; *Galveston R. R. Co. vs. Cowdrey*, 11 Wall., 459, 480, 482; *U. S. vs. New Orleans R. R.*, 12 Wall., 362, 365; *Dillon vs. Barnard*, 21 Wall., 430, 440; *Fosdick vs. Schall*, 99 U. S., 235, 251)."

In the case of *Thompson et al. vs. The White Water Valley Railroad Company et al.*, 132 U. S., 68, this Court, in the 4th point of the syllabus, states the proposition contended for as follows:

"Rails put down upon the company's road and permanent fixtures which are essential to its successful operation become a part of the property of the company—as much so as if they had existed when the mortgage was executed."

In the case of *Joy et al. vs. City of St. Louis*, 138 U. S., 1, this Court, in determining the character of the superstructure placed on the right of way, says (a case almost decisive of this):

"The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no particular use to a railroad without a superstructure and rails; the track is a necessary incident to the enjoyment of the right of way."

Justice BREWER, in the case of *Keener et al. vs. Union Pacific Railroad*, 31 Federal, 128, defines the words "right of way" as follows:

"The term 'right of way' has a twofold significance. It sometimes is used to mean the mere intangible right to cross; a right of crossing; a right of way. It is often used to otherwise indicate that strip which the railroad company appropriates for its use, and upon which it builds its roadbed. Ob-

viously, the term in the statute in this case has the latter significance, and taxation is to be upon that strip, assessed at its full cash value, which the railroad company has appropriated and is using as its right of way, and upon which, to its entire width, it may place its tracks and side tracks; therefore, by the very terms of the statute, this right of way—this strip—thus occupied by the railroad company for now eighteen years, has been taxed to the railroad company, and these taxes have been paid by it."

When railroads came into existence and the right of eminent domain was conferred upon them it was found that many existing legal terms were applicable to railroads. Among such terms is this term "right of way," which has been universally adopted by legislatures and railroads themselves as a generic phrase to designate in any give case a certain, definite and and fixed amount of land held exclusively for the use of a railroad company and upon which its permanent structures are located for the operation of its road. A very interesting history of the early conception of railroads in this country and of their relation to the public with respect to their "right of way," etc., is found in the opinion of Mr. Justice BRADLEY in the case of *Lake Superior R. R. vs. U. S.* (93 U. S., 442), from which we quote as follows (the italics are ours):

"Be this, however, as it may, the general course of legislation referred to sufficiently demonstrates the fact that in the early history of railroads it was quite generally supposed that they could be public highways in fact as well as in name. This view pervaded the language of most charters granted at that period, many of which still remain in force, and the railroads constructed under them are theoretically, at least, public highways to this day. This fact affords the only explanation of much of the language used, not only in those early charters, but in many of those which have been granted since, the latter adopting, as was natural, *the forms of phraseology found prepared to hand.* The forms of legislative expression thus adopted and coming down from a period when they had greater *practical significance* than they now have, bring with them an established sense which renders them free from all uncertainty and doubt. We know as well as we know the sense of any phrase in the English language which has a historical meaning and application what is meant when a railroad is spoken of, i n

a law, as a 'public highway.' We know that it refers to the immovable structure stretching across the country, graded and railed for the use of the locomotive and its train of cars."

In the case of *Palmer vs. Forbes et al.*, 23 Ill., 300, the Court, in speaking through Chief-Justice CATON, uses the following language:

"The railroad itself, including the ground and superstructure, as well as the depot grounds, buildings and turntables, and the like, are real estate, no doubt has ever been expressed, but it is denied that the rolling stock and other property, capable of being removed from the road without breaking the soil or leaving a trace of the removal, is to be treated as a part of the road itself, and pertaining to the real estate.

"We are of the opinion that the rolling stock, rails, ties, chairs, spikes and all other material brought upon the ground of the company incumbered by the mortgage, and designed to be attached to the realty, should be considered as a part of the realty, and incumbered by the mortgage as such."

In *Hunt vs. B. S. I. Co. et al.*, 97 Mass., p. 279, FOSTER, J., says:

"There can be no doubt that the rails, when laid upon a roadbed and fastened there so that engines and cars could pass over them, would have become annexed to the realty and ceased to be personal property, in the absence of any agreement changing the ordinary rule of law. * * * Our own adjudged cases fully support the position that rails, when laid, become a part of the realty in the absence of any agreement to the contrary."

See, also,

Pierce vs. Emery, 32 N. H., 484; and

In the case of *Bank vs. Anderson et al.* (75 Va., 250) the Court of Appeals of Virginia determined that old rails, severed from the soil to which they were attached, on account of their unfitness for further use, changed, upon such severance from the real estate, to personal property.

In the important and leading case of Milhau vs. Sharp, 27 N. Y., 620, the Court of Appeals in New York was considering the effect of a grant by the corporate authorities of New York

City to a corporation to build a street railroad upon one of its streets without limitation as to time, etc., and the Court held that the ordinance was void because of the fact that upon building the road it would become permanently attached to and a part of the fee which the city authorities would thereby surrender the right to use for a public street, the Court saying:

"The rails when laid would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns. * * * The title of the rails, when permanently attached to the land, and such right in the land as may be requisite for their maintenance are therein granted to the defendants by ordinance."

In the case of the People *ex rel.* vs. Cassity, 46 N. Y., 46, it was claimed that three miles and a half of railroad owned by a corporation was personal property, and could not be taxed as real estate, but the Court held that the taxing officers had a right to tax the real estate upon which the superstructure was laid, and that necessarily the superstructure was included in such taxation as real estate. In the case of the City of New Haven vs. F. & W. R. R. Company, 38 Conn., 422, it was contended that the superstructure of a street railroad, attached to the street, and the interest to which it was attached, were insufficient interest in land to be assessed, for benefit of street improvements, but the Court decided against the proposition, saying:

"The rails, sleepers, ties and spikes of the horse railroad company, so laid into and attached to the soil of the street as to become a part of the realty, were real estate."

In the case of the North Beach and Mission Railroad Company, 32 Calif., 499, there was an attempt, by a street railroad company, of San Francisco, to evade payment of a portion of the cost of widening the street upon which the railroad was operated, upon the theory that only the owners of the soil could be assessed for benefits growing out of the widening of

the street. In an extremely able review of the authorities relating to easements, etc., Justice SAWYER, delivering the opinion of the Court, summed the matter up as follows:

"Thus it appears that the appellant has acquired an interest in the soil in Kearny street; that it consists in the location of the road in the street, its right to lay down rails and attach them to the soil, and to run its cars over them for profit; its right to the exclusive use of them and the streets, so far as is necessary for the purpose, in the mode prescribed; that this interest is property—an interest in the land—and that it is real estate, and the rails thus laid down, attached to the soil and annexed to the easement became themselves a part of the land—of the estate of the company—and that, in those States where no special provision is made for taxing this species of property in a different mode, it is assessed as real estate in the same manner and upon the same principles, and as land—as if the company owned the land itself upon which the track is laid to the extent of its interest in it. The interest is local—fixed to the particular land, the particular street—and cannot be enjoyed beyond or independent of that fixed locality. It is as immovably established on the particular portion of the earth as the lot occupied by stores fronting on the same street, and the estate in the one can no more be enjoyed away and apart from its fixed locality than the estate in the other; and the right of the street railroad company to the exclusive control and enjoyment of its estate in the soil of the street to the full extent of that estate is as perfect as the right of the lessee or owner of the lot fronting on the same street to control and enjoy his estate. The several estates are substantially the same kind and are of equal dignity before the law, but one is larger, more extensive, than the other. Practically, they differ only in the quantity of interest, not in quality."

In the case of the *Chicago & Alton R. Co. vs. Dennison, etc.*, 98 Ills., 350, the Supreme Court of Illinois held that thirty-two acres of land in the vicinity of Bloomington, covered with tracks, cars, shops, machine shops, blacksmith shops, foundry, roundhouses, freight depot, stock yards, paint shops, etc., were a part of the right of way of the Chicago and Alton Railroad Company, for the purpose of taxation, although there was nothing in the statute that required or provided that such grounds should be so included in such words.

The Supreme Court of Indiana, in the case of *Pfaff, Auli-*

tor, etc., vs. Terre Haute & I. R. Co. (108 Ind., 144), followed the decision of the Supreme Court of Illinois, upon a careful review of all the authorities. Practically the same decision was made by the Supreme Court of North Dakota in a very recent case, being the case of *C., M. & St. P. R. Co. vs. Cass County*, 76 N. W. Rep., 239.

See, also, to the same affect, *State vs. N. J. R. R.*, 35 N. J. Law, 537, and the recent case decided by the Supreme Court of Pennsylvania, in January of this year, of *W. N. Y. & P. R. Co. vs. Venango et al.*, reported in 38 Atl. Rep., 1088.

II.

It is perfectly clear, from the provisions of the Act, that Congress intended that the railroad, which was to be built upon the "right of way" provided for, should be permanent, and for all time, and that it was not to be in the nature of a mere "*trade fixture.*" If the superstructure, placed upon this "right of way" to make a completed railroad, is a permanent fixture that has become a part of the estate, it is difficult to understand the claim that, for the purposes of assessment and taxation, it can be segregated from the balance of the estate, which it is a part of, without express authority from Congress.

III.

This Court, at a very early day in railroad history, in the case of *York & Maryland Line R. Co. vs. Winans* (17 How., 30), speaking through CAMPBELL, J., stated a principle of law concerning the rights and duties of railroad companies, which is now elementary. Justice CAMPBELL, in speaking of the duties and obligations of a railroad company to the sovereignty creating it, says:

"Important franchises were conferred upon the corporation to enable it to provide the facilities of communication and intercourse required for the public convenience. Corporate

management and control over these were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature *(Beman vs. Rufford*, 1 Simon, N. S., 550; *Winch vs. B. and L. Railway Company*, 13 L. & E., 506*)*."

This statement of Justice CAMPBELL has been often quoted with approval by this Court.

Thomas vs. R. R. Co., 101 U. S., 83.
P. A. R. R. Co. vs. St. Louis, etc., R. Co., 118 U. S., 308.
O. R. & N. Co. vs. O. R. R. Co., 130 U. S., 27.
Central Transportation Co. vs. Pullman's Palace Car Co., 139 U. S., 40.
J. M. P. R. & N. Co. vs. Hooper, 160 U. S., 524.

The principle involved in the quotation from Justice CAMPBELL'S opinion, which has been so thoroughly affirmed by this Court, has been carried to its logical conclusion that a railroad company has no right to discharge itself from performing its duties to the public by removal of the superstructure placed upon its right of way without the express consent of the Government. A very clear statement is made by Justice ALLEN of this proposition, in speaking for the Supreme Court of Kansas, in the case of *The State ex rel. vs. D. C. M. & T. R. Co.*, 53 Kansas, 377. We quote from Justice ALLEN'S opinion, as follows:

"While the title to a completed railroad is vested in the corporation, it is only private property in a qualified sense. Railroads, like all other public thoroughfares, are public instrumentalities. The power to construct and maintain railroads is granted to corporations for a public purpose. The right to exercise the very high attributes of sovereignty, the power of eminent domain and of taxation, to further the construction of railways, could not be granted to aid a purely private enterprise. The railway corporation takes its franchises subject to the burden of a duty to the public to carry out the purposes of the charter. The road, when constructed, becomes a public instrumentality, and the roadbed, superstructure and

other permanent property of the corporation are devoted to the public use. From this use, neither the corporation itself, nor any person, company or corporation deriving its title by purchase, either at voluntary or judicial sale, can divert it without the assent of the state. It matters not whether the enterprise as an investment be profitable or unprofitable, the property may not be destroyed without the sanction of that authority which brought it into existence. Without legislative sanction, railroads could not be constructed. When once constructed, they may only be destroyed with the sanction of the state. The legislature unquestionably has the power to authorize the abandonment of railroads when they cease to be of public utility. * * * The general propositions stated above are abundantly supported by authority: *E. & N. E. Rld. Co. vs. Casey*, 26 Pa., 287; *The State vs. S. C. & T. Rld. Co.*, 7 Neb., 357; *People vs. L. & N. Rld. Co.*, 10 N. E. Rep. (Ill.), 657; *Railroad Commrs. vs. P. & O. C. Rld. Co.*, 63 Me., 269; *Railway Co. vs. Mining Co.*, 68 Ill., 489; *Gates vs. Railroad Co.*, 53 Conn., 333; *Thomas vs. Railroad Co.*, 101 U. S., 71; *Railroad Co. vs. Winans*, 17 How., 30; *Pierce vs. Emery*, 32 N. H., 484; *People vs. N. Y. C. & H. R. Rld. Co.*, 28 Hun, 543.

" These views are also in accordance with prior decisions of this court: *Commrs. of Leavenworth Co. vs. Miller*, 7 Kas., 479; *St. J. & D. Rld. Co. vs. Ryan*, 11 *Id.*, 603; *The State ex rel. vs. Bridge Co.*, 22 *Id.*, 438; *City of Potwin Place vs. Topeka Rly. Co.*, 51 *Id.*, 609.

" A railroad is a public highway and none the less so because constructed through the agency of a corporation deriving its existence and powers from the state. Such a corporation was created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given primarily for the benefit of the public " (Smith vs. Ames, 169 U. S., 466).

It is quite clear that the " right of way " granted and acquired by the Atlantic and Pacific Railroad Company in the Territory of New Mexico, upon receiving its permanent superstructure, became so impressed with the public uses and purposes expressed in the act under consideration that neither the Atlantic and Pacific Railroad Company, nor any one claiming under it, has the right to remove from its " right of way " any such portion of it as would prevent the Atlantic and Pacific Railroad Company, or its successors, from operating it for the

purposes of its creation, or prevent the Government from using the line under the 11th section.

The completed portion of the railroad of the Atlantic and Pacific Company in New Mexico is, in a very large sense, a public highway, which the Government of the United States has the right to use, as a postal and military route, upon such terms as Congress may, at any time, see fit to impose.

In view of the public character of this railroad, it is hardly possible to believe that Congress intended that the permanent superstructure upon the "right of way" should, for any purpose, be severable from such "right of way," as "trade fixtures are severable," and be treated as the personal property of the railroad company, separate and distinct from the estate to which it is affixed.

THIRD POINT.

Congress intended that the right of way of the Atlantic and Pacific Company which was provided for in the act under consideration should be an estate in fee simple.

I.

The estate which the Atlantic and Pacific Railroad Company acquired as "right of way" under the provisions of the act being of such a character as to absorb any permanent fixtures attached to it, it is a matter of very little importance whether such estate be technically an easement or an estate in fee, and we should not discuss this question were it not that counsel for appellant states in his brief that appellees place their claim of the exemption of the superstructure upon the sole ground that this estate is an estate in fee, while, as

counsel proceeds to argue, it is less than a fee—in fact, an easement of so low an order and character that fixtures attached to the property are not included in the estate of the Railroad Company. Counsel for appellant is mistaken in this assumption that we now claim, or in the past, have claimed it to be at all essential to establish the proposition that the "right of way" provided for, vested an estate in fee simple, in the company. We believe, however, that the "right of way" granted by the second section and the "right of way" to be obtained under the provisions of the seventh section are when vested in the company, estates in fee simple.

In the case of the *Missouri, Kansas & Texas R. Co. vs. Roberts*, 152 U. S., 114, this Court, in determining the character of an estate vested in a railroad company by a grant of a "right of way" contained in the Act of July 27, 1866 (14 Stat., 289), determined that the "right of way" granted was an estate in fee simple. The words constituting the grant of the "right of way" under consideration in that case are found in the proviso, contained in the first section of the act, which reads as follows:

"*Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the president of the United States."

It is true, as claimed by appellant, the Circuit Court of the United States for the Southern District of California, in the case of the *Mercantile Trust Company vs. Atlantic & Pacific Railroad Company* (63 Fed. Rep., 913) determined that the decision of this Court in the Roberts case, that the title granted was a fee, was mere *dictum*. This decision of the Circuit Court resulted from the overlooking by the learned Judge who de-

livered the opinion of the fact that the Roberts case was tried in the State Courts in Kansas, and that, under the Kansas Code, actions of ejectment can be brought for the purpose of determining title to real estate, which, whenever it is in controversy, can be absolutely determined in such an action.

A. T. & S. F. vs. Pracht, 30 Kas., 66.
Bancroft vs. Chambers, 10 Kas., 364.
Blanchard vs. Brown, 3 Wall., 245.
Sturdy et al. vs. Jackway et al., 4 Wall., 174.

The Roberts case discloses that the action was brought and tried for the express purpose of determining the title to the "right of way" involved, and that, therefore, the decision of this Court upon that question can, by no possibility, be considered *dictum*.

The Supreme Court of the State of California in the case of the *Southern Pacific R. R. Co. vs. Burr*, 86 Cal., 279, had occasion, in *banc*, to determine the character of the estate granted by the second section of the Act of Congress of July 1, 1862 (12 Stat., 489). The grant of the right of way contained in the act construed by the California Court is practically the same as the one under consideration. The second point in the syllabus of the case referred to reads as follows:

"The act of Congress of July 1, 1862, granting to the Central Pacific Railroad Company a right of way two hundred feet in width on each side of its road, did not grant a mere easement for the construction and operation of its road, but operated as a special grant of land, and is a conclusive legislative determination of the reasonable and necessary quantity of land to be dedicated to this public use, and gave to the grantee the exclusive right to the possession of all the land embraced in the grant of such right of way; and the railroad company may maintain an action of ejectment to recover possession of the whole of the four hundred feet so granted, although only occupying a small portion thereof for its roadbed."

The Supreme Court of Illinois in the case of *Wiggins Ferry Company vs. Ohio and Mississippi Railway Company*, 94 Ill.,

83, in considering a "right of way" granted by deed upon conditions subsequent, held that the way granted was a base or qualified fee.

The Supreme Court of New Jersey in the case of *N. Y. S. & W. R. R. Co. vs. Trimmer*, 53 N. J. L., 1, determined that the estate acquired by a railroad company as "right of way" is greater than an easement, and that it is a misnomer to call it an easement.

If Congress intended that the estate to be acquired as right of way should be less than a fee, it undoubtedly intended that it should be a greater interest in the land than that of a mere common law easement.

The Supreme Court of Iowa, in the recent case of *Smith et al. vs. Hall et al.*, reported in 72 N. W. Rep., 427, in speaking of the character of the estate acquired by a railroad as a right of way, uses the following language:

"The easement is not that spoken of in the old law books' but is peculiar to the use of a railroad, which is usually a permanent, perpetual highway of travel and commerce, and will rarely be abandoned by non-user. The exclusive use of the surface is acquired, and damages are assessed, on the theory that the easement will be perpetual; so that, ordinarily, the fee is of little or no value unless the land is underlaid by quarry or mine (*Hollingsworth vs. Railroad Co.*, 63 Iowa, 443, 19 N. W., 325; *Cummins vs. Railroad Co.*, 63 Iowa, 397, 19 N. W., 268; *Clayton vs. Railroad Co.*, 67 Iowa, 238, 25 N. W., 150). The nature and quality of the interest taken and conferred is necessarily limited and fixed by the legislature and whether only an easement or a full fee title is purely for its determination."

K. C. R. R., vs. Allen, 22 Kas., 285.
Hazine vs. R. R. Co., 3 Gray, 560.

It is plain that Congress intended to give to the railroad company the same character of title to the "right of way" granted over the public domain as it intended the company to acquire, by condemnation proceeding under the seventh section, where it is stated that, upon completion of such condemnation proceedings, the company shall "*acquire full title to the same for the purposes aforesaid.*" It must be true that the

company acquired in its "right of way" obtained under either section of the act such an estate in the soil, as made the railroad, machine shops and other buildings, and permanent fixtures attached thereto an inseparable part of it.

The moment the line of definite location was made by the Atlantic and Pacific Railroad Company through the Territory of New Mexico, an estate in fee in the land included in the "right of way" granted by the second section of the act was vested in the company, subject only to forfeiture by the Government of the United States on happening of the conditions subsequent.

Railroad Co. vs. Alling, 99 U. S., 463.
Railroad Co. vs. Baldwin, 103 U. S., 428.
Bypee vs. O. & C. R. R. Co., 139 U. S., 663.
Noble vs. Union River Logging Co., 147 U. S., 165.
N. P. R. R. Co. vs. Smith, 171 U. S., 260.

In *Noble vs. Union River Logging Co.*, 147 U. S., 165, this Court, in construing the right of way Act of 1875, says:

"The language of that section is, 'that the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory,' etc. The uniform rule of this court has been that such an act was a grant *in præsenti of lands to be thereafter identified*, (*Railway Co. vs. Alling*, 99 U. S., 463). The railroad company became at once vested *with a right of property in these lands*, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtless lie by the United States for the cancellation and annulment of an approval thus obtained (*Moffat vs. U. S.*, 112 U. S., 24, 5 Sup. Ct. Rep., 10; *U. S. vs. Minor*, 114 U. S., 233, 5 Sup. Ct. Rep., 836)."

FOURTH POINT.

The grant of exemption from taxation of the "right of way" contained in the second section of the act exempted all improvements that Congress intended should be placed upon such right of way for the purpose of building and operating the railroad contemplated by the act.

I.

In the case of the Appeal Tax Court of Baltimore City vs. the Baltimore Cemetery Company, 50 Md., 432, a question of this kind was considered. The defendant cemetery company's charter provided that "the land of the company dedicated to the purposes of a cemetery shall not be subject to taxation of any kind."

The assessors assessed for taxation the permanent improvements, claiming authority under an act requiring assessors, in valuing real estate, to estimate the value of the land per acre, and "separately to value the improvements thereon."

The Court says :

"The whole contract shows that the permanent improvements are treated as realty, as the law regards them, *and in our judgment the exemption of the lands from taxation necessarily embraces also an exemption of the permanent improvements thereon,* used for the purposes of a public cemetery, and which are essential to the use and enjoyment of the land for the purposes contemplated in the charter."

In Osborne vs. Humphrey, 7 Conn., 335, a tract of land owned by an ecclesiastical society had been demised by it to certain parties for nine hundred and ninety-nine years. The State sought to collect taxes on the property, or, if the lands were held to be exempt under the act exempting the property of ecclesiastical societies, on the buildings which had been erected by the lessees. The Court, on page 339, says :

" It is emphatically asked why should not the plaintiff be taxed to the extent of his buildings ? My answer is, *the buildings are attached to the land, which the legislature, having the power and the right, have been pleased to exempt from taxation for the public good.*"

In Parker vs. Redfield, 10 Conn., 490, an ecclesiastical society divided its land into building lots, and leased the lots to parties for various terms. One of these lessees was taxed for a building on the land. The agreement in the lease was that the lessee should have the right to remove the buildings at the end of his term, and the Court held that in consequence of this the building was personalty, did not become a part of the realty, and was not exempt with the realty. The Court says:

" It is readily conceded that had the Episcopal Society improved the lands granted to them by erecting buildings thereon, or in any other manner the improvements so put on, would not either in their hands, or the hands of their lessees, have been liable to taxation. They would have constituted a part of the land and would, therefore, have been exempted within the provisions of the statute.

" So, also, had they leased the lands for a term of 999 years, and buildings had been erected thereon by their lessees, the case would have fallen within the principle of Osborne vs. Humphrey ; and the buildings as well as the land would have been exempted, and for the same reason, viz.—that they were a part of the land."

In Lehigh Coal and Navigation Co. vs. Northampton County, 8 W. & S., 334, it was held that the bed, berm-bank, tow-path, toll houses and collectors' offices of a canal formed part of the canal itself, and were, consequently, exempt from local taxation.

Schuylkill Navigation Co. vs. Berks County, 11 Pa. St., 202.

An exemption from taxation of property necessarily used in operating a railroad was held to apply to an inn used exclusively by persons arriving and departing on the train.

Milwaukee, etc., R. R. Co. vs. Crawford Co., 48 Wis., 666.

The exemption of all machines, vehicles or carriages belonging to a railway company, with all their works, was held to exempt its real estate, as well as its rolling stock.

Richmond vs. D. R. R. Co., 21 Grat., 604.

Mayor, etc., of Baltimore vs. B. & O. R. R. Co., 6 Gill, 288.

A provision that a certain tax on the capital and debts of railroad companies should take the place of all other taxes on railroads and horse railroad property and franchises was held to exempt property whether used for railroad purposes or not.

See Osborne vs. N. Y. & N. H. R. R. Co., 40 Conn., 491.

In North Carolina the charter of a railroad company provided among other things that:

"All the real estate held by the company for right of way, for station places of whatever kind, and for work shop location, shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum."

A question arising as to the true construction of this provision of the charter was ably considered by the Supreme Court of North Carolina in the case of R. & D. R. R. Co. vs. Alamance, 84 N. C., 504.

The taxing authorities undertook to assess a lot occupied by the company, upon which was constructed an office building used by the officers of the company, there also being on the same property the post-office and two buildings occupied by private persons as stores and warehouses, also the machinery in the workshops.

The Supreme Court held that the lot was clearly exempt from taxation, as also the machinery, and says:

"It is manifest that the erection of workshops, such as those put upon the land of the company, were in contemplation of the Legislature when the act was passed, and a fair and reasonable construction of the language will take in the machinery and its accessories to be operated in the workshop.

Of what use is the naked building or land without these fixtures and implements in accomplishing any benefit to the road? And why should the one and not the other, so intimately associated for a common purpose, be relieved from the burden?"

"We do not enter into the niceties and technical distinctions in reference to what are and are not fixtures, and pass with the land in controversies between landlord and tenant, vendor and vendee, and others, but looking to the broader purpose of exemption in inviting the investment of capital in a great self-supporting enterprise for the improvement of the State, in connection with the large contribution of the State itself to ensure its completion, we cannot separate the building from the machinery and necessary adjuncts within in giving effect to the provision for exemption, and in our opinion all are protected alike. The cases cited in the brief are but in confirmation of this view."

Makepeace, *ex parte*, 9 Ired., 91.
Bryan vs. Lawrence, 5 Jones, 337.
Latham vs. Blakely, 70 N. C., 368.
Bond vs. Coke, 71 N. C., 97.
Deal vs. Palmer, 72 N. C., 582.
Moore vs. Valentine, 77 N. C., 188.

See, to the same effect, The Schuylkill Navigation Co. vs. The Commissioners of Berks Co., 11 Pa. St., 202, and Railroad vs. Berks, 6 Pa. St., 70.

This Court cited approvingly some of these decisions, in the case of United States vs. Denver, &c., Railway Company, 150 U. S., 13, where it is stated in the opinion:

"Again, exemption from taxation is construed with greater strictness in favor of the State than grants of public property or rights, for the reason that taxation is more essential to the existence of government than ownership and possession of public property. Yet it has been held in several well-considered cases that where a railroad is exempt from taxation such exemption extends to structures like those in question. Thus, in the case of the Lehigh Coal and Navigation Co. vs. Northampton County, 8 W. & S., 334, it was held that as an incorporated canal was not taxable, not only the bed, berm-bank and tow-path of the canal, but the *lock houses* and *collectors' houses*, were also exempt, these being considered constitutent parts of the canal or *necessarily incident thereto*. So in Railroad Co. vs. Berks County, 6 Penn., St., 70, it was held that as the railroad was exempt from taxation, water stations and depots, including the offices and places to hold cars, &c., *being*

necessary and indispensable to the construction and use of the road, were within the exemption, while warehouses and coal lots, intended for the mere convenience of the road, were not so exempt. The principle of these cases is followed and illustrated in the case of State vs. Commissioners, 3 Zabr. (23 N. J. L.), 510, and in the case of Worcester vs. Western Railroad, 4 Met. (Mass.), 564."

In Inhabitants of Worcester vs. The Western Railroad Corporation, 4 Met., 564, above cited, it was contended "that although the mere franchise or right of way along the strip of land appropriated to the track of the railroad may be exempted from taxation, yet that the real estate, consisting of buildings and other structures connected with it is not entitled to the same exemption." But the Court, speaking by Chief-Justice SHAW, held that the exemption extended to the buildings, using the following language:

"The Court are therefore of the opinion that this railroad corporation is not liable to taxation, for the land of the width of five rods, located for the road, nor for any buildings or structures erected thereon, so that they be reasonably incident to the support of the railroad, or to its proper and convenient use for the carriage of passengers and the transportation of commodities; and that this includes engine and car houses, depots for the accomodation of passengers, and warehouses for the convenient reception, preservation and delivery of merchandise and all goods and articles carried on the road."

Is it not reasonably clear upon authority that an exemption of "right of way" includes such permanent structures as may be placed thereon in the construction of a railroad?

It will be conceded that where improvements of this character are placed upon land with the intent of all parties that they shall be removed by the owner a different rule applies.

Wiggins Ferry Co. vs. Railway Co., 142 U. S., 396.

Congress having exempted the right of way, or real estate, from taxation, we submit that, within the rule of the foregoing authorities, the superstructure is also exempt.

In this connection we call attention to the very able

opinion of Chief-Justice SMITH delivered in this case in the Court below (Le Cose 106, pp. 69 to 79).

We also call special attention to the decision of the Supreme Court of Montana (N. P. R. R. Co. vs. Carland, 5 Mont. 146), upon this very question, where it was sought, as in the case at bar, to assess and tax a portion of the superstructure of the Northern Pacific Railroad Company, the charter of which contains the same exemption.

FIFTH POINT.

If the question of the scope of this exemption be at all doubtful, the practical construction placed upon it, by the Territory and its officers charged with the execution of the revenue laws, ought to receive great weight, if it be not controlling, so far as this Territory is concerned.

In view of the fact that the Legislature of New Mexico has never attempted, in any manner, to provide a method or means of assessing the property sought and attempted to be assessed in the case at bar separate and distinct from the real estate to which it was and is attached, and in view of the further fact that this property has never paid any taxes during its existence, it seems very clear that the Territory of New Mexico, so far as the enactment of any laws is concerned, or so far as its various Legislatures are concerned, has never sought or intended to have this property taxed, but has, by its acquiescence and its inaction admitted that without permissive legislation it has no right to tax the same.

What is the legal effect of the practical construction thus placed upon the charter of the railroad company and upon the

territorial revenue laws by the officers charged with their execution? It is not claimed that the practical construction placed upon a statute by the officials charged with its enforcement can override its plain and obvious meaning, or should be resorted to when there is no ambiguity or obscurity, But where doubt exists as to the construction or meaning of a statute, the Courts will construe it in the same manner as it has been construed during a series of years by the officers who are responsible for its enforcement.

In *United States vs. Union Pacific Railway Company*, 148 U. S., 562, 572, it is said:

"If there were any doubts with regards to the interpretation of the Act of 1869, the construction placed upon it by the law department for eighteen years, under which construction these lands have been put upon the market and sold, would undoubtedly be entitled to considerable weight."

Again, it is said in *United States vs. Tanner*, 147 U. S. 663:

"If it were a question of doubt, the construction given to this clause prior to October, 1885, might be *decisive;* but as it is clear to us that this construction was erroneous, we think it not too late to overrule it. It is only in case of doubt that the construction given to an act by the department charged with the duty of enforcing it becomes material."

"Great weight," said Chief-Justice MARSHALL, in *Cohens vs. Virginia*, 6 Wheat., 418, "has always been attached, and very rightly attached, to contemporaneous exposition."

In re Washington, 115 N. Y., 442, 447, PECKHAM, J., said:

"Such acquiescence and recognition on the part of the officers of the government are of very considerable, if not of controlling, weight in the interpretation of a general act of the legislature relating to public objects like the one under consideration. *Euston vs. Pickersgill*, 55 N. Y., 310; *People vs Dayton, Id.*, 367."

In *Commonwealth vs. Mann*, 168 Pa. St., 290, it is held that "in construing a statute, the construction placed upon it for twenty years from the time it became a law, by those whose

duty it was to construe it, and who were affected by it, is proper for consideration."

In *United States vs. Pugh*, 99 U. S., 265, 269, it is said:

"It is a familiar rule of interpretation that in the case of doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect."

Clark's Run & Road Co. vs. Commonwealth, 29 S. W., 360.
Edward's Lessee vs. Darby, 12 Wheat, 210.
In re Board of Street Opening, 33 N. Y., 594.
Endlich on statutes, Sec. 357.
23 Am. & Eng. Encycl. Law, p. 339.

Surely great importance should be attached to the fact that for the fourteen years of the operation of the Atlantic and Pacific Railroad, a practical construction was placed upon its charter and upon the revenue laws of New Mexico in exact accordance with the claim of exemption now made. In case of doubtful meaning such construction should be decisive; and before the Territory can overthrow the established course of procedure and the acquiescence for so many years in the belief that the taxes here sued for were not properly assessable, it must show that its claim is perfectly clear and entirely free from doubt.

SIXTH POINT.

There is no provision in the laws of the Territory of New Mexico authorizing the segregation of the superstructure from the right of way of any railroad for purposes of assessment or taxation, and, therefore, the assessments in question were void.

Regardless of the question as to whether or not, under the Act of Congress, the Territory of New Mexico, or any of its legal subdivisions, had the right to assess, for the purpose of taxation, the superstructure of the Atlantic and Pacific Railroad Company permanently attached to its "right of way," neither of these counties, under the revenue laws of the Territory, had any power or authority to separate this superstructure from the "right of way," in order to assess it for taxation, separate and distinct from the real estate to which it is attached.

In other words, the only way in which this property could be legally assessed under the laws of New Mexico, regardless of the question of exemption under the Act of Congress, would be to assess the superstructure and the "right of way" as one complete and entire thing and as real estate.

The statutes of New Mexico applicable to this question are Sections 2807, 2822, 2834 and 2835 of the Compiled Laws of 1884, and read as follows :

"2807. The terms mentioned in this section are employed throughout this chapter in the sense herein defined :

"*First.* The term 'real estate' includes all lands within the territory to which title or right to title has been acquired ; all mines, minerals and quarries, in and under the land, and all rights and privileges appertaining thereto and improvements.

"*Second.* The term 'improvements' includes all buildings, structures, fixtures and fences erected upon or fixed to land, whether title has been acquired to said land or not.

"*Third.* The term 'personal property' includes everything which is subject of ownership, not included within the term 'real estate.'

"*Fourth.* The term 'credit' includes every claim and demand for money, or other valuable thing, and every annuity or sums of money receivable at stated periods; but pensions from the United States and salaries, or payments expected for services to be rendered are not included in the above term.

"2822. The assessor is required, between the first day in March and the first day in May of each year to ascertain the names of all taxable inhabitants, and all property in his county subject to taxation. To this end he shall visit each precinct in the county, and exact from each person a statement in writing, or list, showing separately.

"*First.* All property belonging to, claimed by, or in the possession or under the control or management of such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, cashier or managing agent.

"*Second.* The county in which such property is situated, or in which it is liable to taxation.

"*Third.* A description by legal subdivisions, or otherwise, sufficient to identify it, of all real estate of such person and a detailed statement of his personal property, including average value of merchandise for the year ending March 1st; amount of capital employed in manufactures; number of horses, mules, cattle, sheep, swine and other animals; of carriages and vehicles of every description; jewelry, gold and silver plate; musical instruments; household furniture; moneys and credits; shares of stock of any corporation or company; and all other property not herein enumerated, with the value of the different classes of property in detail."

"2834. On on before the first Monday in March, annually, the assessor shall make out an assessment book or roll, with appropriate headlines, alphabetically arranged, in which must be listed all the property in the county subject to taxation. Such book shall contain the names of the persons to whom the property is assessed, with the several species of property and the value as hereinbefore indicated, with the columns of numbers and values as given by the person making the return, as fixed by the assessor, and as decided by the county commissioners. At the end of such book or roll all property assessed to 'unknown owners' shall be entered.

"2835. Each tract of land shall be valued and assessed separately except when one or more adjoining tracts are returned by the same person, in which case the may be valued and assessed together."

It will be seen that the first subdivision of Section 2807, as applied to this matter, reads as follows: "The term 'real estate,' includes * * * all rights and privileges appertaining thereto and improvements." This, with the provisions of the second subdivision, that the term "improvements" includes everything erected upon or affixed to land, clearly shows that, under the statutes of New Mexico, the superstructure and the "right of way" to which the superstructure of this railroad is affixed, should be assessed, if at all, as one thing, and as real estate, to be described in the manner required by the third subdivision of Section 2822 and Section 2835. No power is given to separate the improvements affixed to any interest in land from that interest, as such interest, whatever it may be, and the improvements attached to it are one therewith and inseparable therefrom. Counsel for appellant has cited a number of cases going to the proposition that possessory interests in real estate are taxable (a proposition not denied), and he has also cited a California case, showing that improvements are to be assessed separate from the realty. Section 2 of Article 13 of the Constitution of California, which went into effect May 7, 1879, provides that "lands and the improvements thereon shall be separately assessed." Of course, under this provision, all improvements on real estate in California are assessed separately from the land, but under the statutes of New Mexico, the improvements and lands are included in the interest in lands, which is to be assessed as one thing. It will be conceded that a valid assessment is an essential prerequisite to a valid tax levy.

County of Santa Clara vs. S. P. R. Co., 118 U. S., 394.

People vs. C. P. R. R. Co., 127 U. S., 1.

Therefore, if under the revenue law of New Mexico, improvements permanently affixed to an estate in land cannot be separated from such estate by the taxing officers for the purposes of assessment, these assessments, made in this case,

were absolutely illegal, regardless of the question of exemption. It is no argument against the proposition that the segregation of these improvements, for the purposes of assessment, was rendered necessary by the exemption of the estate to which they were attached; if a law could be passed which would permit the segregation of the same for such purposes it is a matter for the Legislature of New Mexico, or Congress, to act upon, and not for this Court to consider on this argument.

SEVENTH POINT.

The burden is upon the Territory to make it clearly appear that it has the right to assess for the purpose of taxation a part of an estate which Congress has declared exempt in such Territory from taxation either by Congress or the Territory.

I.

It will be conceded that the Territory of New Mexico is a mere municipal corporation of the United States, and that Congress has absolute and complete control thereover, having the right to enact such laws relative to the rights of the Territory, and of its people as it may see fit to do, within its constitutional limitations.

National Bank vs. County of Yankton, 101 U. S., 133.
Clayton vs. People, 132 U. S., 632.
Latter Day Saints vs. United States, 136 U. S., 1.

At the time Congress passed the act under consideration (and since then) the following provisions of the Revised Statutes of the United States were and have been in full force and effect :

"SEC. 1850. All laws passed by the legislative assembly and governor of any territory, except in the territories of Colorado, Dakota, Idaho, Montana and Wyoming, shall be submitted to Congress, and, if disapproved, shall be null and of no effect."

"SEC. 1851. The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

"SEC. 1891. The constitution and all the laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized territories, and in every territory hereafter organized, as elsewhere within the United States."

The Territory of New Mexico did not grant to the Atlantic and Pacific Railroad Company the exemption which is claimed. Whatever the rule might be, if this was a question of the right of the United States to tax this superstructure for its own benefit, such rule would not be applicable to the Territory of New Mexico.

We quote from the opinion of Chief-Justice SMITH in this case as follows:

"It is true that the exemption from taxation by a state is construed with strictnesss in favor of a state, but it will be observed that this discrimination exists where the exemption is the act of the state as to the property within its jurisdiction, not a privilege derived from the general government for the benefit and welfare of the public in the territory belonging to the United States. The Atlantic and Pacific corporation has received no grant from the Territory of New Mexico, and there is no issue between them as to the extent and benefits conferred upon one by the other, and it is not, we conceive, legitimate in arriving at the rights of the territory in the premises to consider it as though it had created a favor and was exacting tribute for its favor. The United States presents no problem, asserts no claim, having by long acquiescence in the immunity of the company from taxation, conceded that it was in conformity with its intention. Were the controversy between the Government and the company the grant should, in the language of the Supreme Court, 150 U. S., p. 14, receive a liberal construction in favor of the purposes for which it was

enacted, and it must be recognized that it would be illegal and oppressive to substitute a different construction between the company and the territory to settle their respective rights. The company derives its rights from Congress, and they should be ascertained and determined by rules that will evolve the intention of Congress, and not by principles in the interest of a local government."

While it may be conceded that the Territory of New Mexico has the right to tax all property within its limits in the absence of any restriction placed by Congress upon such right, yet when Congress has placed a restriction as to any class of property like the exemption of the right of way under consideration, such restriction amounts to a prohibition, and in such a case, should the Territory attempt to limit the scope of the prohibition, the right to do so should be made to appear clearly and beyond any reasonable doubt.

II.

Congress granted an incomplete estate which was subject to forfeiture, for the purpose of having such estate completed and by completion relieved from the possibility of forfeiture. Attached to this estate was this exemption, which became part thereof. The exemption was not in the nature of a privilege personal to the company itself, but was a part of the estate to which it was attached, and which was given to the company for certain public uses.

New Jersey vs. Wilson, 7 Cranch, 164.
Bank of Ohio vs. Knoop, 16 How., 369.
Dodge vs. Woolsey, 18 How, 331.
Bank vs. Kelley, 1 Black, 436.
Von Hoffman vs. City of Quincy, 4 Wall., 535.
Home of the Friendless vs. Rouse, 8 Wall., 430.
Wilmington R. R. Co. vs. Reed, 13 Wall., 264.
Tomlinson vs. Jessup, 15 Wall., 454.
Matheny vs. Golden, 5 Ohio St., 361.
Kumler vs. Taber, 5 Ohio St., 442.

EIGHTH POINT.

I.

Opposed to our contention is the case of the *Atlantic and Pacific R. R. Co. vs. Lesseur*, decided by the Supreme Court of Arizona, and reported in 19 Pac. Rep., 157. An examination of this case will disclose that the decision of that Court is not only illogical, but, as to a part of it, opposed to the decisions of this Court. That Court finds, as stated by Justice BARNES, that the "right of way" is an interest in realty, and that the superstructure placed upon it became part of this "right of way," and then proceeds to hold that the exemption from taxation of the "right of way" did not exempt the superstructure, because of the fact, so far as one can determine, that there was no express exemption in the act of the superstructure as such. The force of this opinion is very much weakened by the fact that the Court held that the federal franchises of the Atlantic and Pacific Railroad Company could be rightfully taxed by the Territory of Arizona and its municipalities, although the Supreme Court of Arizona, at the time, was aware of the decision of this Court in the case of the *People of the State of California vs. C. P. R. R. Co.*, 127 U. S., 1, in which this Court held that the State of California had no power to tax federal franchises, as the above case was cited in that part of the opinion of Judge BARNES dealing with the question of the right of the territory to tax the franchise.

The appellant further cites the case of *Portland, Sage & Portsmouth R. Co. vs. City of Sage*, 60 Me., 196, but an examination of the case will disclose that it has no application whatever to the questions under consideration.

These two cases, we believe, constitute the entire authority of appellant for the proposition that the superstructure assessed and taxed was property so separate and apart from the "right of way" as to form no real part of it.

II.

In addition to these authorities the case for the appellant is based upon the three propositions stated under the 3d, 5th and 6th points in their brief, which are as follows:

"III.

"Exemption from taxation is the exception, and all such exceptions are to be strictly construed.

"V.

"Nothing but a strict rule of construction can be properly applicable to the exemption of the right of way from taxation.

"VI.

"The existence of a well-founded doubt is equivalent to a denial of a claim to an exemption from taxation."

We submit that neither one of these propositions is applicable to the questions involved in this case.

It ought to be perfectly plain that a Territory of the United States would have no power to tax any portion of the railroad built within its limits, under the Act of July 27th, 1866, whatever the rule might be in relation to any State, in which any portion of this road might be built. The decisions of this Court in Thompson vs. U. P. R. R. Co., 9th Wall., 579, and the case of the Union Pacific Railroad Company vs. Peniston, 18th Wall., 5, are not opposed to this proposition. The railroad that was assessed and taxed in each of those cases was not a railroad in which the Government of the United States had reserved a special easement, such as is reserved by the 11th Section of the act under consideration.

We submit that when Congress created the Atlantic and Pacific Railroad a post and military road, subject to the use of the United States for "postal, military, naval and all other government services," it created an absolute property right or

interest of the United States therein. This right or interest so created in this road excepts it from the application of the principles established by the cases referred to.

For the reasons given by Mr. Justice BRADLEY, in his dissenting opinion in the Peniston case, this Court, in California vs. C. P. R. R. Co., 127 U. S., 1, determined that a State could not tax a federal franchise without the permission of Congress. The reasoning of the Court, in the case last referred to, is applicable to a railroad which has, like the one in question, impressed upon it, as a part of it, a special right on the part of the Government to use it for the purpose of moving trains and cars upon whenever it sees fit, at such compensation as it may establish, and especially so when when such railroad is created for the purpose of becoming a national highway—from the Mississippi Valley to the Pacific Ocean.

Whether or not this Court would follow the Peniston case in the case of this railroad, if the question of the right of a State to tax its roadbed were raised, is immaterial, as there is no question that a Territory which exists by permission of Congress has not the right to in any wise interfere with this railroad, by taxation or otherwise. This railroad itself was, and is, impressed with a peculiar public use, such as is not attached to railroads generally. This peculiar public use, creating, as it does, a property interest in the Government of the United States, should be protected from interference by either State or Territory, as fully as the franchise of the company itself is protected. The right to tax is the right to destroy. If New Mexico has the right to tax this superstructure, it necessarily has the right to make such a tax a lien thereon, and to have the superstructure sold under such lien.

VALENCIA COUNTY CASE.

I.

Case No. 458 involves the same questions we have already discussed, and presents the same facts, with this difference:

There was an assessment made in Valencia County, in 1896, for the years 1892 and 1893, years when the railroad company had possession of this property; and the assessor, after determining the assessed value of the property, added a penalty of one-fourth of the assessed value to the assessment, for an alleged delinquency on the part of the Atlantic and Pacific Railroad Company itself, in omitting this property in its returns.

It surely will be conceded that a penalty accruing against the railroad company, for acts of omission on its part, would not be a sufficient basis for a claim against the receiver, to be paid out of the trust funds in his hands, as a claim superior to the lien of the mortgages.

It is stated, on page 4 of brief of appellant, in its statement of its case, that sixty and seven-hundredths (60.07) miles of the road in Valencia County was built on right of way acquired from private owners. The petition filed by the appellant before the District Court claimed that the exemption of the right of way is only the exemption of the right of way over the public domain; that, wherever the right of way was acquired from private owners, this right of way is not exempt (Tr., 32). We suppose that the statement is made for the purpose of showing that this sixty miles of road, over land acquired from private owners, is not exempt, either as to the right of way or the superstructure upon it.

This position is not tenable. From the argument which has preceded there can be no possible doubt but that the exemption was intended to apply to and cover the entire right of way, whether acquired from private individuals or whether the same was upon the public lands. The provision is general: "And the right of way shall be exempt from taxation within the territories of the United States." The term is general. It is not "the right of way aforesaid," nor a right of way defined or limited in any manner. There is no authority for limiting it to the right of way which is located

upon the public domain. To do so would be to interpolate in the act words not warranted by any reasonable or justifiable inference. As stated heretofore, to permit the territory to tax any portion of the right of way or the railroad would be to empower the territory to enforce the tax by levy and sale—to sell a portion of the entire railroad, thereby segregating a mile or so from the balance of the railroad, and destroying the line for the purposes intended by Congress. Under the act the railroad company is granted a right of way through the public lands, and it is also empowered, where necessary, to condemn and take, to the same width or extent, a right of way over the lands of private individuals. But, however acquired, it is still "the right of way" of the railroad company. The argument heretofore made is equally applicable, and demands the same construction of the provision of the Act of Congress in respect to exemption from taxation in the one case as in the other.

The particular assessments in question cannot, however, be upheld, because, as previously shown, the assessor had no authority or power under the laws of New Mexico to assess a fixture or superstructure separately from the land. No power was given to the assessors to assess as personalty that which the statute declared to be realty and assessable, if at all, as such. Such assessments having been made, therefore, without authority of law, are void and afford no basis for the levying of taxes.

FINAL POINT.

The levies of taxes sought to be recovered by the intervening petitions in the three cases now before this Court are illegal and void, regardless of any question of exemption or of any statutory authority of the Territory of New Mexico.

I.

If the Court should hold that the exemption granted by the Act of Congress to the Atlantic and Pacific Railroad Company does not include the superstructure of the railroad, and if the Court should further hold that under the statutes of New Mexico, the assessments in the cases at bar were properly and legally made, then we claim that the levies of the taxes so assessed are illegal and void because against public policy.

No argument or citation of authorities is required to establish the proposition that by the 11th Section of the act the Government of the United States acquired an easement in the constructed railroad of the Atlantic and Pacific Railroad Company for all time to come, an easement of great importance and of very great value to the Government. In virtue of this easement, the United States has the right at any time to operate for its purposes, and upon its own terms, the trains or cars of the Atlantic and Pacific Railroad Company over the railroad of that company. The right claimed by the Territory to tax the superstructure of the railroad includes the right to destroy the same. The only right that the Territory had to intervene in the foreclosure suits for the purpose of having a portion of the trust fund appropriated to the payment of the taxes was upon the theory that the taxes sought to be recovered were specific liens upon the superstructure, under the provisions of Section 4057 and of Section 4073 of the statutes of New Mexico, which read as follows (Compiled Laws 1897) :

SECTION 4057. " Every tax levied according to the provisions of this act shall have the force and effect of a judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon from the date of the levy thereof, and taxes due from any person upon personal property shall not be satisfied nor the lien removed until the taxes are abated or paid on the property sold for the payment thereof. The tax

list and warrants hereinbefore provided for shall have the force and effect of an execution against the person or property assessed."

SECTION 4073. " All real estate, and all interest or title which any person may have therein upon which taxes shall not have been paid before the first day of January of each year shall be subject to sale as hereinafter provided for the sale of bonds for taxes."

In the case of California vs. C. P. R. R. Company, 127 U. S., 1, this Court considered very carefully the power of the State of California, to tax certain franchises granted by Congress, among which was a franchise granted by the 18th Section of the act under consideration.

We quote from the opinion of Justice BRADLEY upon this question as follows :

" It cannot, at the present day, be doubted that Congress, under the power to regulate commerce among the several states, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transporation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course, the authority of Congress over the Territories of the United States, and its power to grant franchises exercisible therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of State as well as Federal corporations (see *Pacific Railroad Removal Cases*, 115 U. S., 1, 14, 18.

"Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the company, situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment it cannot. * * * In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden and may be laid so heavily as to destroy the thing taxed or render it valueless. As Chief-Justice MARSHALL said in McCulloch vs. Maryland, 'the power to tax involves the power to destroy.' Recollecting the fundamental principal that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this Court in *McCulloch vs. Maryland*, 4 Wheat., 316; *Osborn vs. The Bank of the United States*, 9 Wheat., 738, and *Brown vs. Maryland*, 12 Wheat., 419, and in numerous cases since which have followed in their lead, abundantly sustain these views we have expressed. It may be added that these views are not in conflict with the decisions of this Court in *Thomson vs. Pacific Railroad*, 9 Wall., 579, and *Railroad Co. vs. Peniston*, 18 Wall., 5. As explained in the opinion of the Court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations (18 Wall., 35, 37)."

It seems to us that the reasoning of Justice BRADLEY upon the question discussed by him is fully applicable to the proposition under consideration. The Government of the United States has an important and valuable easement in the Atlantic and Pacific Railroad, which, by reason of such easement, has become an instrument enabling the Gov-

ernment to exercise one of its most important functions. The Atlantic and Pacific Railroad, in virtue of such easement, is an instrument by means of which the United States Government is enabled to exercise one of its most important functions. Has the Territory of New Mexico, a mere municipality of the United States, power to destroy the railroad in which the United States has so valuable an easement, which was created for the purpose of aiding the United States in the performance of its functions? In the absence of an express grant of power by Congress, public policy prohibits the taxation by the Territory of New Mexico of the property which is in question in these cases.

We therefore respectfully submit that the judgment of the Supreme Court of the Territory New Mexico was correct and should be affirmed.

C. N. STERRY,
Solicitor for Receiver C. W. Smith and United States Trust Co.

E. D. KENNA,
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Office Supreme Court U. S.
FILED
OCT 25 1898
JAMES H. McKENNEY,
Clerk.

Nos. 106, 169 and 170.
Brf. of Morawetz for Appellees

Filed Oct. 25, 1898.

Supreme Court of the United States.

OCTOBER TERM, 1898.

TERRITORY OF NEW MEXICO, *Appellant,* *against* UNITED STATES TRUST COMPANY OF NEW YORK ET AL., *Appellees.*	Nos. 106, 169 and 170.

Memorandum of Argument for Appellees.

VICTOR MORAWETZ,
Of Counsel for Appellees.

C. G. Burgoyne, Walker and Centre Streets, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1898.

TERRITORY OF NEW MEXICO, Appellant, AGAINST UNITED STATES TRUST COMPANY OF NEW YORK ET AL., Appellees.	Nos. 106, 169 and 170.

Memorandum of Argument for Appellees.

These cases involve the following two questions, viz. :

1. What is the proper construction of the grant of exemption from taxation contained in Section 2 of the Act of Congress incorporating the Atlantic and Pacific Railroad Company, approved July 27, 1866, entitled " An act granting lands to aid in the construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Coast " (14 U. S. Stat., p. 292) ?

2. Were the assessments of the improvements, cross-ties, rails, bridges, culverts, structures, etc., constituting the railroad of the Atlantic and Pacific Railroad Company lawful and regular under the Act of Congress and the statutes of the Territory of New Mexico ?

Section 2 of the Act of Congress is as follows:

"SEC. 2. *And be it further enacted*, that the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn tables and water stations; **and the right of way shall be exempt from taxation within the territories of the United States.**" * * *

We contend on behalf of the Appellees:

First. That the term "right of way" in this grant of exemption from taxation means *the strip of land or way*, which, pursuant to the Act of Congress, was appropriated and set apart for the construction and maintenance of the line of railway described in the Act; or, if it does not mean the strip of land or way itself, then it means *the right, interest or estate of the Railroad Company therein;* and, in either event, the exemption relates to this strip of land or way in the condition in which Congress intended that it should be placed by the construction of the line of railway.

Secondly. That there is no law of the Territory of New Mexico under which the cross-ties, rails, bridges, culverts, structures and other improvements, constituting part of this strip of land, can be assessed and taxed separately from the strip of land itself, or the estate, interest and right of the Railroad Company therein; and that the assessments in controversy were illegal and irregular under the laws of the Territory.

I.

THE NATURE OF THE ESTATE OF THE ATLANTIC AND PACIFIC RAILROAD COMPANY IN ITS RIGHT OF WAY.

The actual nature of the estate acquired by the Railroad Company in the strip of land constituting its "way" or "right of way" is plain, whether this estate be designated in technical language as an estate in fee simple, or a conditional, qualified or base fee, or a mere easement.

Congress authorized the railroad company to build, maintain and operate a railroad upon a designated route, and granted to the Railroad Company, its successors and assigns, for that purpose, a right of way through the Territories, and declared that "*said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain.*" Congress further gave to the railroad company the right, where its line of road was located through lands not belonging to the Government, to enter upon, purchase, take and hold any other lands or premises necessary for the construction and working of the road, and declared that when property should be taken pursuant to condemnation proceedings, and paid for, "*said premises shall be deemed to be taken by said company, which shall thereby acquire full title to the same for the purposes aforesaid.*" It will be observed that the way acquired by the railroad company under the act was not merely a strip of land for laying its tracks, but a strip extending one hundred feet in width on each side of the railroad to be constructed.

The railroad company acquired not merely a right to use for railroad purposes this strip of land designated as its "right of way," leaving the ownership and possession in others subject to this right of user, **but the railroad company acquired the perpetual and exclusive right of possession of the land.** It acquired the right to enclose

the strip of land constituting its right of way by fences, and to exclude all others therefrom. This exclusive right of possession and use of the right of way was given to the Railroad Company, its successors and assigns in perpetuity, and by Act of Congress, approved April 20, 1871 (17 U. S. Stat., p. 19), it was authorized to mortgage the same.

It is submitted that this estate of the railroad company in the strip of land constituting its right of way is properly defined as an estate in fee, though possibly subject to a condition subsequent that the land may be forfeited if the railroad itself should ever be abandoned.

M. K. & T. R. R. Co. vs. Roberts, 152 U. S., 114.
Railroad Co. vs. Baldwin, 103 U. S., 428.
Bybee vs. Railroad Co., 139 U. S., 663.
Southern Pacific R. R. Co. vs. Burr, 86 Cal., 279.
N. Y. S. & W. R. R. Co. vs. Trimmer, 53 N. J. L., 1.

II.

MEANING OF THE TERM "RIGHT OF WAY" IN THE GRANT OF THE EXEMPTION FROM TAXATION.

In construing the clause granting this exemption from taxation the purposes which Congress intended to accomplish by incorporating the Railroad Company and the immediate object of the grant of the exemption must be considered.

In 1866, when the act was passed incorporating the Atlantic and Pacific Railroad Company, there was no completed railroad across the continent, but charters had been granted incorporating the Northern Pacific and the Union Pacific Railroad Companies. It was deemed a matter of pressing public interest to secure the construction of the lines of these com-

panies, and large bounties were offered in order to induce the public to furnish the necessary means.

Section 3 of the act incorporating the Atlantic and Pacific Railroad provides: "That there be and hereby is granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of the said line of railway and its branches, every alternate section of public land," etc.

Section 11 of the Act provides: "And be it further enacted, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

Contemporary history shows that large donations had been made in 1862 and 1864 to secure the construction of the Northern Pacific and Union Pacific railroads—donations far richer than those granted to the Atlantic and Pacific Railroad Company—but that these donations, up to the time of the passage of the Atlantic and Pacific charter, had not proved sufficient to secure the construction of these railroads. It is only reasonable, therefore, to presume that when Congress granted this exemption from taxation it intended to grant something of value. We do not claim that the Court should on that account extend the exemption beyond the natural meaning of the terms of the grant; but we do claim that the grant should be construed according to the reasonable and fair meaning of its terms, having regard to the conditions existing when the grant was made, and that this Court will not, by applying an unfair method of construction, defeat the reason-

able expectations of those who relied upon the promise of the Government.

It has repeatedly been recognized by the Courts that the term "right of way" is commonly used to designate the strip of land or way appropriated for the construction and maintenance of a railroad, and not merely the intangible right or privilege of passing over and using this strip of land or way.

In Central Trust Co. vs. Wabash Ry. Co., 29 Fed. Rep., 546, the question arose as to the proper construction of a contract made by a railroad company to permit other companies to use its "right of way." Mr. Justice BREWER, in delivering the opinion of the Circuit Court, used the following language:

"The language of the ninth paragraph, under which, as before noticed, intervenors must claim, is that the party of the second part shall permit other railroads to use its 'right of way.' Now, the term '*right of way*' has a two-fold signification—it sometimes is used to describe a right belonging to a party, a right of passage over any tract; and *it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed.* Obviously, in this paragraph, it is used in the latter sense. Through both of these contracts the terms 'right of way,' 'track' and 'road-bed' frequently appear, and in all cases the term 'right of way' is used as descriptive of the strip above referred to."

In the same case, upon appeal to this Court (reported in 138 U. S., under the title of Joy vs. St. Louis), the language of Mr. Justice BREWER was quoted and approved; and this Court furthermore decided that the grants to other roads of the right to use the "right of way" embraced the whole thereof, and that the track was a mere incident to the enjoyment of the right of way. Mr. Justice BLATCHFORD, in delivering the opinion of the Court, said:

"The grant to other roads of the privilege of using the right of way applied to the whole of such right of way through the park, and not to a particular part of it. *The track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident.* A right of way is of no practical use to a railroad without a superstruct-

ure and rails. *The track is a necessary incident to the enjoyment of the right of way.*"

In Keener vs. Union Pacific Ry. Co., 31 Fed. Rep., 126, the Circuit Court decided that, under a statute providing that "taxation shall be made upon the entire railway within this State and shall include the *right of way*, roadbed, etc," the term "right of way" did not relate to a mere intangible right, but to the strip of land appropriated by the railway company for its use, and upon which its roadbed was built, and that this strip of land was taxable at its full cash value.

It is, however, immaterial whether the railroad company acquired an estate in fee or an easement in the strip of land, or way which constituted its "right of way;" and it is equally immaterial whether the term "right of way" in the exemption from taxation be construed as meaning this strip of land or way itself or merely the right, interest or estate of the railroad company therein.

If the title to the strip of land constituting the right of way remained in the United States or in the other owners from whom the right of way was taken by condemnation proceedings, and the railroad company merely acquired an easement therein, then the term "right of way" in the act means the perpetual and exclusive right to possess and enjoy this strip of land having a railroad constructed thereon, and this perpetual exclusive right of possession and enjoyment was exempted from taxation. If the title to the land constituting the right of way remains in the Government, then this title includes the railroad, which has become part of the land, and neither the land and railroad, nor the perpetual and exclusive right of the railroad company to use this land and railroad, can be taxed.

If, on the other hand, the railroad company acquired title to this strip of land or way, then the exemption of the right of way from taxation exempted it in the form in which it was

placed by the railroad company, in compliance with the requirements of the Act of Congress, by converting it into a railway.

It is too clear to require argument that the cuts, fills, embankments, bridges, ties, rails and permanent structures constituting the railroad of the Atlantic and Pacific Railroad Company became inseparably affixed to the land constituting its right of way, and cannot be taken up and separated therefrom by the railroad company, its successors or assigns; and it seems equally clear that they cannot be separated therefrom by the Territory of New Mexico through the operation of its taxing power. Power to tax includes power to seize and sell for non-payment of taxes. Could the Territory of New Mexico seize and sell for taxes the embankments, tunnels, cross-ties, rails, bridges and other structures upon the right of way except by seizing and selling the entire right of way and thus wholly defeating the exemption from taxation?

Counsel for the Territory could not deny that the land constituting the *way* upon which the railroad was built is exempt from taxation; they could not deny that the *right and estate* of the Railroad Company in this way is exempt. They were bound, therefore, to take the position that the improvements of this way—the cuts, embankments, ditches, tunnels, the ties in the ground and the rails fastened thereon—are properly separable from the way or right of way itself and do not constitute part thereof (Appellant's brief, Point II.). But such improvements are not in truth and in fact separate or separable from the way or right of way. They are as much a part of the way or right of way as the ditches and underground drains, banks and other permanent improvements of a farm are part of the farm itself. They are constituent parts of the property or estate which was exempted from taxation; and, as the whole includes its constituent parts, the exemption of the way or right of way from taxation exempts those improve-

ments which are part of it. While the Territory nominally seeks to support this taxation on the ground that the property taxed is separate from the way or right of way which is exempt, this is a mere fiction. **In reality, the position of the Territory is that the exemption must be so construed as to except from its operation the increase of value of the right of way resulting from the construction of the railroad, and that the right of way is taxable to the extent of such increase of value.**

In order to sustain the position of the Territory of New Mexico in these cases it must be held that Congress did not intend to exempt from taxation the right of way in the condition in which the Railroad Company was required to maintain and use it, but intended that all improvements of the right of way, by the construction of the line of railway without which the right of way would have no value, should be excluded from the exemption and should be subject to separate taxation. It must be held that practically all that Congress intended to grant was the intangible right or franchise to construct and maintain a railroad through a trackless waste of arid land—a right which Congress by general statute has granted equally to all railroad companies in the United States—a right which is practically valueless.

We submit that such a construction of the act cannot be sustained, because it would warp the language of the act from its natural and ordinary meaning, and would defeat the evident purpose of Congress. If that construction of the act is correct, then the grant of the exemption from taxation was a delusion and a snare to those who regarded it as a valuable donation or bounty offered by Congress to secure the construction of this railroad.

Congress intended the grant of exemption from taxation to be a bounty or donation of value. Congress intended the right of way thus exempted from taxation to be used for a

railroad. Congress knew that, as has been stated by this Court in *Joy vs. St. Louis, supra*, "the track cannot be separated from the right of way, the right of way being the principal thing and the track merely an incident. A right of way is of no practical use to a railroad company without a superstructure and rails. The track is a necessary incident to the enjoyment of the right of way." Is it reasonable, then, to hold that Congress intended that the exemption from taxation should apply only to the right of way as an unimproved strip of land which could not lawfully be used for any purpose except railroad purposes and which was of no value for any other purpose, and that everything done by the railroad company in improving this right of way by building a railroad, as required by the Act of Congress, should furnish a basis for taxation?

The opinion of the Supreme Court of the Territory of New Mexico sustaining in all respects the contention of the Appellees is printed as part of the record of case No. 106, now before this Court.

In *Northern Pacific Railroad Co. vs. Carland*, 3 Pacific Reporter, 144 (5 Mont. 146), the same conclusion was reached by the Supreme Court of Montana in construing the grant of exemption from taxation given by Congress to the Northern Pacific Railroad Company by Section 2 of its charter (13 U. S. St., 367), in identically the same language as is used in the grant to the Atlantic and Pacific Railroad Company.

It has repeatedly been held that an exemption of land or other property from taxation includes the improvements upon the land or property which, in law, become part thereof.

In the Appeal Tax Court of Baltimore City vs. The Baltimore Cemetery Co., 50 Md., 432, the defendant's charter provided that "the land of the company dedicated to the purposes of a cemetery shall not be subject to taxation of any kind."

The assessors assessed for taxation the permanent improvements on the land, claiming authority under an act requiring assessors, in valuing real estate, to estimate the value of the land per acre, and "separately to value the improvements thereon."

The Court says:

"The whole contract shows that the permanent improvements are treated as realty, as the law regards them, and in our judgment the exemption of the lands from taxation necessarily embraces also an exemption of the permanent improvements thereon, used for the purpose of a public cemetery, and which are essential to the use and enjoyment of the land for the purposes contemplated in the charter."

In Osborn vs. Humphrey, 7 Conn., 335, the question was whether the leasehold interest of a lessee of land from any ecclesiastical society under a lease for ninety-nine years, or the buildings erected upon the land were taxable under a statute of Connecticut which exempted from taxation "lands, tenements, hereditaments and other assets" granted for charitable purposes. The Court held that neither the land nor the buildings upon the land could be taxed. Judge PETERS, in delivering the opinion of the Court, said (p. 339):

"It is emphatically asked, why should not the plaintiff be taxed to the extent of his *buildings*? My answer is, the buildings are attached to the land, which the legislature, having the power and the *right*, have been pleased to exempt from taxation for the public good." * * *

In Parker vs. Redfield, 10 Conn., 490, an ecclesiastical society divided its land into building lots, and leased the lots to parties for various terms. One of these lessees was taxed for a building on the land. The agreement in the lease was that the lessee should have the right to remove the buildings at the end of his term, and the Court held that, in consequence of this, the building was personalty—did not become a part of the realty, and was not exempt with the realty. BISSELL, J., delivering the opinion of the Court, said:

"It is readily conceded that, had the Episcopal Society improved the lands granted to them, by erecting buildings thereon, or in any other manner, the improvements so put on, would not, either in their hands or the hands of their lessees, have been liable to taxation. They would have constituted a part of the land, and would, therefore, have been exempted within the provisions of the statute.

"So, also, had they leased the lands for a term of 999 years, and buildings had been erected thereon by their lessees, the case would have fallen within the principle of Osborne vs. Humphrey, and the buildings, as well as the land, would have been exempted, and for the same reason; viz., that they were a part of the land."

In Richmond & Danville R. R. Co. vs. The Commissioners of Alamance, 84 N. C., 504, it appeared that the charter of the North Carolina Railroad Company contained a provision that "all the real estate held by the company for right of way, for station places of whatever kind, and for workshop location, shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum."

The Supreme Court held that this provision exempted from taxation a lot occupied by the company, upon which was constructed an office building used by the officers of the company, there also being on the same property the post-office and two buildings occupied by private persons as stores and warehouses, and also the machinery in the work-shops.

In its opinion in this case the Supreme Court used the following language:

"It is manifest that the erection of work-shops, such as those put upon the land of the company, was in contemplation of the Legislature when the act was passed, and a fair and reasonable construction of the language will take in the machinery and its accessories to be operated in the work-shop. Of what use is the naked building, or land without these fixtures and implements, in accomplishing any benefit to the road? And why should the one, and not the other, so intimately associated for a common purpose, be relieved from the burden?"

"We do not enter into the niceties and technical distinctions in reference to what are and are not fixtures, and pass

with the land in controversies between landlord and tenant, vendor and vendee and others, but looking to the broader purpose of exemption in inviting the investment of capital in a great self-supporting enterprise for the improvement of the State, in connection with the large contribution of the State itself to insure its completion, we cannot separate the building from the machinery and necessary adjuncts within in giving effect to the provision for exemption, and in our opinion all are protected alike. The cases cited in the brief are but in confirmation of this view. Makepeace, *ex parte*, 9 Ired., 91; Bryan vs. Lawrence, 5 Jones, 337; Latham vs. Blakely, 70 N. C., 368; Bond vs. Coke, 71 N. C., 97; Deal vs. Palmer, 72 N. C., 582; Moore vs. Valentine, 77 N. C., 188."

See, also, Richmond vs. Railroad Co., 21 Gratt., 604.

In United States vs. Denver &c. Railway Co., 150 U. S., 13, this Court said:

"Again, exemption from taxation is construed with greater strictness in favor of the State than grants of public property or rights, for the reason that taxation is more essential to the existence of government than ownership and possession of public property. Yet it has been held in several well-considered cases that where a railroad is exempt from taxation such exemption extends to structures like those in question. Thus in the case of the *Lehigh Coal & Navigation Co. v. Northampton County*, 8 W. & S., 334, it was held that as an incorporated canal was not taxable, not only the bed, berm-bank and towpath of the canal, but the lock houses and collectors' houses were also exempt, these being considered constituent parts of the canal or necessarily incident thereto. So in *Railroad Co. v. Berks County*, 6 Penn. St., 70, it was held that as the railroad was exempt from taxation, water stations and depots, including the offices and places to hold cars, &c., being necessary and indispensable to the construction and use of the road, were within the exemption, while warehouses and coal lots, intended for the mere convenience of the road, were not so exempt. The principle of these cases is followed and illustrated in the case of *State v. Commissioners*, 3 Zabr. (23 N. J. L.), 510, and in the case of *Worcester v. Western Railroad*, 4 Met. (Mass.), 564."

The cases cited upon this point in the brief of counsel for the appellant do not apply.

In *People vs. Cassity, 46 N. Y., 50*, the Court of Appeals of New York construed a statute providing that "all lands * * * within this State, whether owned by individuals or

by corporations, shall be liable to taxation. * * * "The term 'land' * * * shall be construed to include the land itself, and all buildings and all other articles erected upon or affixed to the same * * *; and the term 'real estate' and 'real property' * * * shall be construed as having the same meaning as the term 'land' thus defined;" and the Court decided that the right of a street railway company to lay down a track and use the same for the passage of its teams and vehicles, constituted an interest in "land" or "real estate" within the meaning of the statute and that the track, being affixed to the land, was therefore liable to taxation.

The case of *People vs. Commissioners of Taxes, 82 N. Y., 459*, is to the same effect.

Counsel for the Appellant have cited various cases in which it was held that an occupant of public lands has a possessory interest or claim which constitutes property having a substantial and salable value, and that such interest or claim, and any improvements upon public lands so occupied, are taxable as property of the occupant (See *People vs. Shearer*, 30 Cal., 645; *Crocker vs. Donovan* (Oklahoma), 30 Pac. Rep., 377; *Waller vs. Hughes* (Arizona), 11 Pac. Rep., 122; *Turney vs. Saunders*, 4 Scam., 527). This proposition we do not dispute. It tends to support our claim that an exemption from taxation of a possessory interest in land for railroad purposes exempts the possessory interest in the land as improved for railroad purposes.

In *Portland, etc., R. R. Co. vs. City of Saco, 60 Me., 196* (cited by counsel for appellants), the point decided was that certain real estate of the railroad company, including a depot and other buildings thereon, were taxable as real estate, although it was provided by law "that the track of the road and the line on which it is constructed shall not for the purposes of taxation be deemed real estate." In its opinion the Court used the following language:

"The exemption from taxation is limited to 'the track of the road and the line on which it is to be constructed.' It

does not in terms extend to their appurtenances, railroad depots constituting no part of 'the track of the road.' If they are exempt from taxation it is because they are to be regarded as 'the line on which the track is constructed.'"

The decision of the Supreme Court of Arizona in the case of Atlantic and Pacific R. R. Co. vs. Leseuer, 19 Pac. Rep., 157, is in favor of the contention of the appellants, but it is submitted that the reasoning of the Court shows that this decision is not entitled to weight as an authority. In that case the Court say:

"No one can question that a right of way is an interest in the realty; nor that culverts, bridges, railway switches, depot buildings, etc., thereon become part of the realty. He who has title to the right of way has title to the superstructure. They would pass by grant and would be subject to the laws regulating the conveyance of real estate, including the statute of frauds. All this will be conceded, but does it follow that the exemption of the right of way exempts all appurtenances afterwards attached thereto?" (p. 158).

"Congress granted a right of way over the public lands and in the same section it exempts what is granted from taxation. It did not grant improvements, culverts, bridges, buildings, iron, ties, etc. This was property to be placed there afterwards by the grantees. Shall we infer that it exempted what it did not grant when it does not say so or use words looking in that direction? We think not. We should stand by the letter of the law, in favor of equality of taxation" (p. 159).

In the same case, the Supreme Court of Arizona held that, notwithstanding the decision of this Court in California v. Pacific Railroad Company, 127 U. S., 1, the franchise which Congress granted to the Atlantic and Pacific Railroad Company could be taxed by the Territory.

III.

THE STATUTES OF NEW MEXICO DO NOT AUTHORIZE THE SEPARATE TAXATION OF IMPROVEMENTS PLACED UPON REAL ESTATE, AND THE ASSESSMENTS IN THESE CASES ARE IRREGULAR AND ILLEGAL.

The sections of the Compiled Laws of New Mexico, under which the assessments in these cases were made, are set forth at length in our brief.

Section 2807 is as follows:

"2807. The terms mentioned in this section are employed throughout this chapter in the sense herein defined.

"*First.* The term 'real estate' includes all lands within the territory to which title or right to title has been acquired; all mines, minerals and quarries, in and under the land, *and all rights and privileges appertaining thereto and improvements.*

"*Second.* The term 'improvements' includes all buildings, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not.

"*Third.* The term 'personal property' includes everything which is subject of ownership not included within the term 'real estate.'

"*Fourth.* The term 'credit' includes every claim and demand for money, or other valuable thing, and every annuity or sums of money receivable at stated periods; but pensions from the United States and salaries, or payments expected for services to be rendered, are not included in the above term."

Section 2822 requires the assessor in each year to prepare lists showing separately all taxable property of each person, the county in which such property is situated or in which it is liable to taxation, and a description by legal subdivisions, or otherwise, sufficient to identify, of the real estate of each person, and a detailed statement of his personal property.

Section 2834 provides that an assessment roll shall be made out in which must be listed all the property in the county subject to taxation, with the names of the persons to whom the property is assessed and the several species of property as hereinbefore indicated.

It appears, therefore, that not only is there no provision in the statute of New Mexico authorizing the assessment and taxation of improvements upon real estate separately from the real estate itself but, on the contrary, the statute in express terms provides that "real estate" for the purposes of the statute shall include "*all rights and privileges appertaining thereto and improvements.*"

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JAMES H. McKENNEY,
Clerk.

No. 169.

Brf. of Sterry, Kenna & Dunlap for

IN THE Appellees (rela

Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

Filed Apr. 3, 1899.

THE TERRITORY OF NEW MEXICO,
Appellant.

vs.

THE UNITED STATES TRUST COMPANY OF NEW YORK, and C. W. SMITH, Receiver of the property of the Atlantic and Pacific Railroad Company,
Appellees.

No. 169.

BRIEF AND ARGUMENT OF APPELLEES UPON PETITION FOR REHEARING FILED BY APPELLANT.

C. N. STERRY,
SOLICITOR FOR APPELLEES.

E. D. KENNA,
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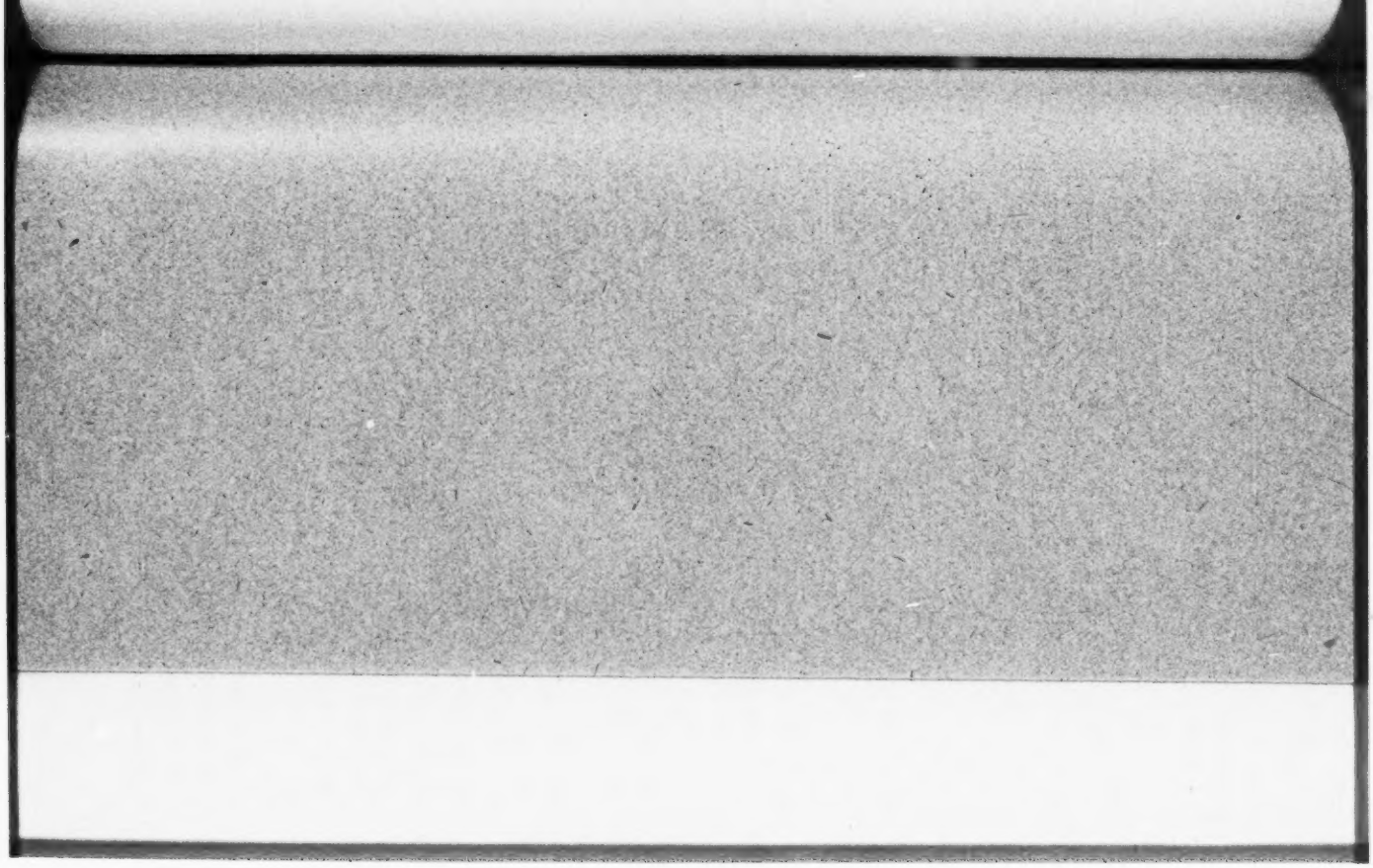

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PRELIMINARY.

This court ought not to consider the question sought to be presented on pages 58 and 59 of the petition for rehearing, for many very cogent reasons, among which are the following:

FIRST POINT.

The question proposed for the consideration of this court, under its order permitting the filing of the petition for rehearing in case No. 169, is not presented by the record in that case, and never was presented to the District or the Supreme Court of the Territory, or to this court, in any hearing had in the case, prior to the presenting of the petition for rehearing.

I.

The foreclosure suit in which the intervening petition was filed was pending before the District Court of the Second Judicial District of the Territory of New Mexico for the trial and hearing of causes arising under the constitution and laws of the United States, by virtue of the jurisdiction granted to such courts by section 1910 of the Revised Statutes of the United States. Under this section the procedure in reference to the intervening petition in that court, and the jurisdiction of the court in hearing the same, were the same as if that court had in fact been one of the Circuit Courts of the United States.

The petition of intervention that was filed in this cause appears on pages 30-32, inclusive, of the transcript, except that the exhibits which were attached thereto, consisting of copies of the assessments upon which the taxes claimed were levied, appear on pages 80-85 of transcript.

That the court may fully understand the claims of the Territory as presented by this petition, we here copy that portion of the petition referring to the claim for taxes

for the year 1892, together with the assessment shown by the petition as the basis of the taxes levied for that year:

"Certain property of the Atlantic and Pacific Railroad Company was omitted in the assessment of taxable property within the County of Valencia in the Territory of New Mexico for a series of years, beginning with the year 1892 and ending with the year 1896, and was not put upon the assessor's books for said years, and the assessor in said county having failed to list the same or place it upon his roll before it was returned to the county commissioners, the collector of taxes in said county, after the tax list for the year 1896 had been delivered to him, proceeded to list, value and assess such property in the manner that the assessor might have done, and to enter such assessment in his tax-list and to assess taxes thereon as hereinafter in detail more fully set forth.

"The said collector for the year 1892 entered upon his tax-list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof, from which it appears that the total valuation of said property amounted to $620,390. The tax regularly levied by the proper authorities upon all property within said county for the year 1892, for territorial and county purposes, was at the rate of twenty-one and nine-tenths mills, so that the amount of tax upon the valuation aforesaid amounts $13,586.54, one half of which became deliquent upon the first day of January, 1893, and the other half on the first day of July, 1893, said halves bearing interest, respectively, from said respective dates at the rate of twenty-five per centum per annum."

The only reference to this question contained in the petition are the allegations of the seventh paragraph, reading as follows:

"The receiver of the property of the said railroad company, heretofore appointed in this cause, refuses to pay the said taxes or any part thereof and disputes the validity of the same upon the ground that all of the property so listed, valued and assessed as aforesaid is ex-

empt from taxation by virtue of the provision contained in the second section of an act of Congress, entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,' which became a law on the 27th day of July, 1866; but your petitioner charges that the said exemption from taxation extends only to the right of way granted to said railroad company on each side of its railroad, where it may pass through the public domain, and does not extend to any improvements made upon the said right of way, nor to the said right of way itself where it passes through land not included in the public domain."

The assessments referred to, made for 1892, and attached to the petition, are as follows:

"The cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railway Company in the County of Valencia, and constituting 'improvements' upon the land embraced within said right of way where same runs over what was public domain of the United States when said right of way was granted to said company, 33 miles in length, valued at $6,500 per mile.....$214,500

"Also the cross-ties, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company, in said County of Valencia, and constituting 'improvements' upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile..... $394,550."

The further claim for taxes for the years 1893-4-5-6, as stated by the pe ition, and the assessments upon which the same were based, are precisely the same as stated for the year 1892, with the exception of amounts and dates.

To this petition the Receiver and the Trust Company filed five joint and separate pleas, in each of which it

was alleged, among other things, that the line of the Atlantic and Pacific Railroad Company was constructed under the Act of Congress approved July 27, 1866, through Valencia County, for a distance of 93.458 miles, and that its right of way was 200 feet in width (with additional ground for stations, etc.) and consisted of fifty-eight miles over land which was not Government land, *but which was acquired by the company through the rights conferred upon it by the Act of Congress*, and that the remainder of the right of way was over public lands. (Rec., 33-78.)

This statement in the pleas as to the mileage over public and private lands was made to meet the allegations in reference thereto in the petition as above quoted.

It will be observed that the collector in assessing the property *which he actually assessed*, as shown by the intervening petition and its exhibits, and upon which the taxes claimed were levied, *made no distinction between the "right of way" over government land and the "right of way" over lands other than government land.* No attempt was made by the collector or anyone else *to assess any portion of the "right of way" through Valencia County, whether located upon land held in private ownership or upon public land.* While the collector separated the mileage of this "right of way" through his county so as to show that which was located upon government land separate and distinct from that which was located upon land held in private ownership, such separation was evidently *made for some purpose other than that of assessment of any portion of the "right of way" not located on public land.* The assessor proceeded upon the theory that the entire superstructure was personal property, so entirely separated from whatever interest the

company had in the "right of way," whether located on public land or not, that it should be assessed by itself, separate and apart from the "right of way," and not as a part of it. If there was any thought in the mind of the collector that the fifty-eight or sixty miles of "right of way" which was located on land held in private ownership was not within the exemption clause of the second section of the act, he certainly would have assessed such mileage, in addition to the other assessment made, as it is easy to see that fifty-eight miles of "right of way" 200 feet in width, together with station grounds, etc., would involve a large amount of valuable property for taxation if subject to assessment.

The petition for intervention, having specifically stated the origin of the taxes sought to be declared a lien on the property being foreclosed, disclosed by such statement that the entire case of the Territory was predicated upon the right to treat the superstructure of the railroad placed upon its "right of way" as personal property, separate and distinct from the "right of way" itself, and separate and distinct from whatever interest the railroad had in the real estate over which its right of way was located. The petition therefore disclosed upon its face that the question as to whether any portion of the "right of way" was exempt or not, was not of the slightest materiality to the theory upon which the assessment was made and the taxes levied, and, therefore, the sole claim made by the Territory, in the District Court, in the Supreme Court of the Territory, and heretofore in this court, may be stated as follows:

1. That the superstructure placed upon the "right of way" of the Atlantic and Pacific Railroad did not become any part of the real estate or interest in real estate

upon which such "right of way" was located, but remained personal property of the company, subject to taxation as personal property, entirely separate and distinct from the real estate upon which it was placed.

Or to state it in another way:

2. That the "right of way" of the Atlantic and Pacific was such a mere easement that the superstructure built upon it did not become any part of it, and, therefore, the exemption of such "right of way," either in whole or in part, did not exempt this superstructure, which was not and could not be a part of it.

II.

The decision of the Territorial Supreme Court in case No. 106 (the Bernalillo County case) was rendered December 18, 1896. The intervening petition in this case was filed six months afterwards, on June 10, 1897, by the same counsel who had conducted for the Territory the Bernalillo County case, and who was, of course, thoroughly familiar with that case and the decision of the Supreme Court. Afterwards, on June 23, 1897, the question of the sufficiency of the several pleas filed by the receiver to this intervening petition came on to be heard by the court, and upon such hearing the District Court held:

"That it is neither necessary nor proper to pass upon the question of the sufficiency of said pleas, for the reason that the said intervening petition and matters and things therein set up fall within the decision of the Supreme Court of New Mexico in the matter of a like intervening petition in this cause, rendered on the 18th day of December, 1896, and are therefore not sufficient to entitle the said intervening petitioner to the relief sought by its petition, and that this petition ought to be dismissed.

"It is therefore ordered, adjudged and decreed that the said intervening petition be and the same hereby is dismissed."

It was never suggested to the court at that hearing, in any manner, that there was the slightest difference (in fact there was not) between the Valencia County case and the case already decided by the Supreme Court. In the Bernalillo County case there was no question of this character presented, hinted at or suggested in any of the hearings before the courts; neither was there any statement of the mileage of the "right of way" over lands held in private ownership by the petition filed in that case, or by any other part of its record.

If it be true that the fact of some of the mileage of the Atlantic and Pacific in Valencia County being upon right of way acquired from private parties made any difference so far as the question of exemption of *the property which was assessed* was concerned (which we strenuously deny), it was clearly the duty of the counsel for the Territory to have shown this to the District Court at the time of its action. The District Court assumed, *with the tacit consent of the counsel for the Territory*, that this case was precisely like the Bernalillo County case, and that there were no questions presented by this case which were not covered by the decision of the Supreme Court.

III.

Upon the appeal taken from the order of the District Court dismissing this petition this question was not presented to the Supreme Court of the Territory. Section 3,140 of the Compiled Laws of New Mexico (Compila-

tion of 1897), which was in force at the time of this appeal, provided, among other things, in relation to appeals from the District Court to the Territorial Supreme Court, as follows:

"3140. * * * On appeals and writs of error the appellant and party in error shall assign errors on or before the first day of the term to which the case is returnable; in default of such assignment of errors the appeal or writ of error may be dismissed. * * *"

Pursuant to this statute, assignment of errors was filed by the solicitor general of the Territory in the Supreme Court on August 3, 1897, as follows:

"Now comes the Territory of New Mexico, appellant, and makes the following assignment of errors in the above-entitled cause, and alleges said grounds of error as reasons why the decree rendered therein should be reversed:

"1. That the court erred in holding that appellant's intervening petition and the matters and things therein set up are and were not sufficient to entitle appellant to the relief sought by its petition.

"2. That the court erred in refusing to grant appellant the relief sought by and claimed in said intervening petition.

"3. That the court erred in dismissing said intervening petition.

ALBERT B. FALL,
Solicitor General of New Mexico.

F. W. CLANCY,
Of Counsel."

Afterwards, on the 12th day of August, a further assignment of errors was filed by present counsel for the Territory:

"Now comes the said appellant, by its solicitor, and says to the court here that there is manifest error in the record and decree in this cause, and assigns for error that the court below erred in dismissing the intervening petition of the appellant. Wherefore appellant prays that

the decree of the court below may be reversed, vacated and set aside, and that a decree be entered herein as to this court may seem proper and according to law.

F. W. CLANCY,
Solicitor for Appellant."

It will be observed that therewas never a suggestion in the assignment of errors filed of there being any distinction between the assessment of improvements upon the "right of way" over public land and the assessment of improvements on the "right of way" over land held in private ownership under the provisions of the act.

IV.

The present counsel for the Territory, when this cause was pending before the Supreme Court of the Territory, filed a printed brief therein, and we file with this brief the copy of such brief served upon us under the rules of the Supreme Court of New Mexico.

It will be observed from the brief of counsel filed in the Territorial Supreme Court that neither in its statement of facts nor in its assignment of errors, nor in the arguments advanced in it, was this question presented to the Supreme Court of the Territory. The receiver filed a motion in the Supreme Court of the Territory to dismiss the appeal upon the ground that the decision of that court in the Bernalillo case had determined every question involved in this case, and this motion, upon argument, was sustained by the Supreme Court (Trans., 86, 87), showing that it determined, as it had to determine, that there was no difference between the two cases, either in fact or law. It will be seen that counsel for the Territory failed to present the question now sought to be presented to the District Court, to the Supreme Court of the Territory, or to this court upon the former hearing.

V

We believe that this court had no jurisdiction to consider this case when it was presented to it in the first instance, although we did not then raise the question. Under the provisions of section 1909 of the Revised Statutes an appeal from a decision of the Supreme Court of the Territory of New Mexico to this court is governed by the rules and regulations which would control an appeal from a decision of the Circuit Court of the United States to this court.

Section 997 of the Revised Statutes requires that there shall be annexed to and returned with the writ of error for the removal of a cause to this court from a Circuit Court an authenticated transcript of the record and *an assignment of errors.*

Section 1012 of the Revised Statutes requires that appeals from the Circuit Court shall be subject to the same rules, regulations and restrictions as are prescribed by law in cases of writs of error. These statutes, read together require an assignment of errors to be filed in all cases which are appealed from the decision of a Supreme Court of a territory to this court. Rule VIII of this court requires the transmission of a copy of such an assignment of errors with the record from the lower court. The provisions of the statute and the rules are mandatory.

Defour et al. v. *Land* (U. S. Circuit of App., 5th Circuit), 54 Fed., 913.

U. S. v. *Goodrich* (Circuit Court of App., 8th Circuit), 54 Fed., 22.

Mutual Life Ins. Co. v. *Conoley* (Circuit Court of App., 4th Circuit), 63 Fed., 180.

In the case at bar no assignment of errors was ever filed in the Supreme Court of the Territory, after its decision on August 20, 1897; neither was any assignment of errors transmitted to this court, except only, of course, those filed in the appeal to the Territorial Supreme Court prior to its decision.

SECOND POINT.

Appellant, in the original brief filed in this case, sets out its assignment of errors on page 6, which were not any part of the record transmitted to this court. It is not suggested in this assignment of errors that there was any special error committed, or that the court should not affirm the dismissal of the appeal by the court below, which was affirmed by the Supreme Court of the Territory, because of the assessment based upon improvements made on that part of the "right of way" which was acquired over land owned by private parties.

In the statement of the case made by counsel in the brief originally filed in this case there is no suggestion of any question to be considered by this court of any difference between the assessment of the superstructure on the "right of way" over public land and that on the "right of way" over land acquired from private parties. It is true that in a paragraph on page 4 of the brief it is suggested that in this case there was a separate assessment of the superstructure upon that portion of the "right of way" over lands owned by private parties from the assessment of the superstructure upon the "right of way" over the public land,

and that to this extent the case was different from the other cases; but immediately following this counsel states that the *only question* passed upon by the Supreme Court of the Territory, and the only question to be considered by this court, so far as he or his client is concerned, is the broad question as to whether the exemption contained in section 2 of the charter of the Atlantic and Pacific includes the superstructure placed upon the right of way of the railroad.

One may scan the original brief filed by counsel in this case from beginning to end without finding any evidence of any thought in the mind of counsel of presenting any question such as is now attempted to be presented. It is perfectly apparent from the brief, as well as from the oral argument made at the hearing, that from the inception of this case to a point of time after the decision of this court, there was no intention on the part of counsel for the Territory to claim that there was the slightest distinction between any of the facts involved in this case and the law applicable thereto and the facts and law applicable thereto involved in the Bernalillo County case.

In view of this, the statement of counsel, on page 58 of the petition for rehearing, that—

"Attention was called to this difference in the original brief for appellant, but it does not appear to have attracted the attention of the court"—

is, to say the least, misleading, as the only place in which this difference was called to the attention of the court was (as stated) in the statement of facts, where it was specifically qualified by the assertion inferentially made that this distinction cut no figure, or, if it was a question, it was one of the minor questions not to be discussed.

THIRD POINT.

Upon the facts shown by the record the judgment of the court below must be affirmed, even if this court determines to consider the question presented at this late date in the history of the case.

I.

If we should admit (that which we most emphatically deny) that the fifty-eight or sixty miles of "right of way," of the Atlantic and Pacific Railroad in Valencia County which was located over lands other than public lands is not embraced within the exemption contained in the second section of the act, such admission would not give any right to this court to reverse the judgment of the Territorial Supreme and District Courts, because in such case, while there might have been an assessment of this fifty-eight or sixty miles of "right of way" and taxes levied thereon, *there never was such an assessment or any claim for any taxes based upon any such assessment made by the allegations of the intervening petition*, and therefore no issue of that character has ever been presented to this court or to either of the lower courts.

II.

Under the allegations of the intervening petition and the admissions contained in the pleas it must be presumed that the "right of way" through Valencia County acquired by the railroad company over lands other than public lands was acquired by proceedings had under section VII of the act of Congress approved July 27, 1866.

If the "right of way" was acquired under section VII of the act, there is no question but that the interest in the real estate obtained by the company, in procuring its "right of way" *over lands held in private ownership, was fully as great as the interest the company acquired in the "right of way" over public lands* under the grant contained in the second section.

That the court may see that we are right in this, we quote all that portion of section 7 of the act which is material, as follows (the italics are ours):

"Sec. 7. And be it further enacted that the said Atlantic and Pacific Railroad Company be and is hereby authorized and empowered to enter upon, purchase, take and hold any lands or premises that may be necessary and proper for the construction and working of said road, *not exceeding in width one hundred feet on each side of the line of its railroad*, unless a greater width be required for the purpose of excavation or embankment; and also any lands or premises that may be necessary and proper for turnouts, standing places for cars, depots, station-houses, or any other structures required in the construction and working of said road. And the said company shall have the right to cut and remove trees and other material that might, by falling, encumber its road-bed, though standing or being more than two hundred feet from the line of said road. And in case the owner of such lands or premises and the said company cannot agree as to the value of the premises taken, or to be taken, for the use of said road, the value thereof shall be determined by the appraisal of three disinterested commissioners, who may be appointed upon application by either party to any court of record in any of the territories in which the lands or premises to be taken lie; and said commissioners, in their assessment of damages, shall appraise such premises at what would have been the value thereof if the road had not been built. * * And the payment into court, for the use of the owner of said premises taken, of a sum equal to that finally awarded *shall be held to vest in said company the title of said land*,

and the right to use and occupy the same for the construction, maintenance and operation of said road. * * * And in case any party shall have a right or claim to any land for a term of years, or any interest therein, in possession, reversion, or remainder, the value of any such estate, less than a fee simple, shall be estimated and determined in the manner hereinbefore set forth."

This court has emphatically declared the law to be (in the decision heretofore made) that the superstructure of this railroad when placed upon its "right of way" became by merger a part of whatever estate was acquired by the company in acquiring such "right of way," thereby losing its separate identity as well as its character of being personal property. Sections 4019, 4032, 4044, 4045, 4056 and 4073 of the revenue laws of New Mexico (Compiled Laws of 1897), which were in force at the time of this assessment, *required* the assessment of the "right of way" and its superstructures *as an entirety*, and the assessment of the superstructure separate from the estate to which it was attached *was an illegal* and *invalid assessment*, insufficient to support the claim made for the taxes levied thereon:

"4019. The terms mentioned in this section are employed throughout this chapter in the sense herein defined:

"First. The term 'real estate' includes all lands within the territory to which title or right to title has been acquired; all mines, minerals and quarries in and under the land, and all rights and privileges appertaining thereto, and improvements.

"Second. The term 'improvements' includes all buildings, structures, fixtures and fences erected upon or fixed to land, whether title has been acquired to said land or not.

"Third. The term 'personal property' includes everything which is subject of ownership, not included within the term 'real estate.'

"Fourth. The term 'credit' includes every claim and demand for money or other valuable thing, and every annuity or sums of money receivable at stated periods; but pensions from the United States and salaries or payments expected for services to be rendered, are not included in the above term."

"4032. The assessor is required, between the first day in March and the first day in May of each year to ascertain the names of all taxable inhabitants, and all property in his county subject to taxation. To this end he shall visit each precinct in the county, and exact from each person a statement in writing, or list, showing separately:

"First. All property belonging to, claimed by, or in the possession or under the control or management of such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, cashier or managing agent.

"Second. The county in which such property is situated or in which it is liable to taxation.

"Third. A description by legal subdivisions or otherwise, sufficient to identify it, of all real estate of such person and a detailed statement of his personal property, including average value of merchandise for the year ending March 1st: amount of capital employed in manufactures; number of horses, mules, cattle, sheep, swine and other animals; of carriages and vehicles of every description; jewelry, gold and silver plate; musical instruments; household furniture; moneys and credits; shares of stock of any corporation or company, and all other property not herein enumerated, with the value of the different classes of property in detail."

"4044. On or before the first Monday in March, annually, the assessor shall make out an assessment book or roll, with appropriate headlines alphabetically arranged, in which must be listed all the property in the county subject to taxation. Such book shall contain the names of the persons to whom the property is assessed, with the several species of property and the value, as hereinbefore indicated, with the columns of numbers and values as given by the person making the return, as fixed by the assessor, and as decided by the county commissioners. At the end of such book or roll all property assessed to 'unknown owners' shall be entered.

"4045. Each tract of land shall be valued and assessed separately, except when one or more adjoining tracts are returned by the same person, in which case they may be valued and assessed together.

"4056. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate or any personal property then in his county are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list following the entries made by the clerk, and such entries shall be designated as additional assessments, and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the Board of County Commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him."

"4073. All real estate, and all the interest or title which any person may have therein, upon which the taxes shall not have been paid before the first day of January of each year, shall be subject to sale as hereinafter provided for the sale of lands for taxes."

Under the provisions of these sections, where an interest in real estate is owned by a party who makes improvements thereon, such interest and improvements, as an entirety, must be assessed as real property. To separate the improvements from such interest and assess the same as personal property, or as improvements merely, would be to make an assessment not authorized by the laws of New Mexico, and hence a tax levied upon such assessment could not be enforced in court.

This court in

French v. *Edwards*, 13 Wallace, 506, and

Lyon v. *Alley*, 130 U. S., 177,

has held that the provisions of a statute as to the form and mode of assessment of property for taxation are mandatory and must be strictly pursued, to form the basis of a tax that can be enforced.

III.

Suppose that this court should hold that the portion of the "right of way" which was located on land held in private ownership was not exempt from taxation, would such a determination make valid the assessment which was made of the superstructure separate from the "right of way" to which it was attached? Would not such determination clearly fix the illegality of the assessment in question, under the provisions of the section above quoted? We do not understand from the order made as to the filing of the petition for rehearing, and from briefs thereon, that the former decision of this court, that the superstructure placed upon the "right of way" became a part of such "right of way," is open for discussion.

If this question is not open for discussion, the superstructure placed upon the "right of way" located under the terms of the 7th section of the act became at once by merger a part of such "right of way," and therefore could not under any circumstances be assessed in the manner and way that it was assessed as shown by the intervening petition, and therefore the claim for taxes made was rightly dismissed.

FOURTH POINT.

The proposition made has no merit in it, regardless of the right of the court to hear it.

I.

By the terms of the second section of the act approved July 27, 1866, the "right of way" through public lands, to the extent defined, was granted to the Atlantic and Pacific Railroad Company; and for the purpose of enabling it to procure a "right of way" over that portion of its route which should not cross public lands, the seventh section made provisions for the acquiring of the title to the same from the owners. The right to acquire the land authorized to be purchased or condemned by the seventh section was granted to the railroad company to enable it to build, operate and maintain a railroad thereon, and such strip of land, upon acquisition by the railroad, became, technically, broadly and generically a "right of way" of the Atlantic and Pacific Railroad Company, and this, whether the company acquired an estate in fee in the land or something less than an estate in fee. As Judge ELLIOTT, in his recent work on Railroads, says, in Sec. 5, Vol. 1:

"The latter term [referring to the term "right of way"] has been defined as meaning the way over which the company has the right to pass in the operation of its trains; and as including all the strip of land appropriated by the company for its use, and upon which its roadbed has been built."

Keener v. *Union Pacific Railroad*, 31 Fed., 128.

Joy et al. v. *City of St. Louis*, 138 U. S., 1.

To call a strip of land occupied by a railroad with its track a "right of way" is to characterize the strip by the usual and common name that would be applied to it, both in technical and in ordinary language.

Regardless of the character of the interest acquired by the proceedings under section 7 of the act, would Congress or anyone else call the interest actually obtained by any other name than that of "right of way"?

Counsel lays stress upon the fact that the words "right of way" are not used in the language contained in the seventh section, but the argument made, or attempted to be made, vanishes when the reading of the section shows that there was not the slightest necessity for the use of such words.

By the terms of the seventh section of the act Congress intended to authorize the company to take private property to *precisely the same extent and for precisely the same purpose* that it authorized the company to take land from the public domain by the terms of the second section. Is it possible that Congress, by using the terms "right of way" and "way" in the second section, and omitting them from the seventh section, intended that the land acquired from private owners under the seventh section should not be known, called or considered "right of way"?

To say that the words "right of way" in the exemption clause in the second section of the act are limited to the "right of way" granted over public land by the terms of the act, requires the interpolation of something not in the act itself. By the use of the language,

"—And *the* right of way shall be exempt from taxationwithin the territories of the United States,—"

Congress evidently intended the entire "right of way,"

and not merely that portion thereof which was granted over public lands.

There cannot be the slightest reason, or suggestion of a reason, for saying that Congress desired or intended to limit the exemption from taxation in a territory where its power and authority was supreme to that portion of the right of way to be located over public land, and not to any portion which might be acquired under the seventh section of the act. The power of Congress was plenary with reference to the right to exempt property from taxation in a territory of the United States. Every reason operating to create the exemption of the "right of way" in the territories through which the road was to run over the public lands in such territories would operate to exempt from taxation the "right of way" that was to be acquired over private lands, under the seventh section, in such territories.

The argument heretofore made by counsel for the Territory, both before this court and elsewhere, has always been based upon the proposition that all that the railroad company had or could acquire under any of the terms of the act was a mere "right of way" over lands belonging to others or the government. This contention is reiterated in the petition for rehearing. Now, it seems a little inconsistent for counsel to say that it is not "right of way" when the interest acquired and used happens to be over lands held in private ownership.

The entire force of the argument of counsel in his petition for rehearing, as it seems to us, is based upon the fact that Congress did not, in the seventh section of the act, specifically state that the land it authorized to be taken for the purposes of a "right of way" should be known as a "right of way," although under the law, as counsel insists, it could be known by no other name.

It is wholly immaterial how title to the strip of land used for the operation of the railroad was acquired. Whether under section 2, by grant from Congress, or under section 7, by purchase or condemnation, the strip of land of defined width is acquired for and devoted to the operation of a railroad—a *quasi* public purpose. The holding by the railroad company is different from that of an ordinary owner. The land is held, no matter how acquired, exclusively as a way for the operation of a railroad.

See

C., B. & Q. R. Co v. *City of Chicago*, 149 Ill., page 458, paragraph 10, and page 461.

However the title may have been acquired, such strip of land is, and always has been, generally known and designated as the "right of way." To say that the "right of way" which is exempt from taxation refers solely to the right of way granted in section 2 of the act, because the exemption provision is also found in that section, is to do violence to the language used. Had Congress any such intention appropriate words would have been used, such as "and such right of way aforesaid," or "the aforesaid right of way granted." On the contrary, the language is broad and is satisfied only by a construction which will embrace the entire right of way within the territories.

The language is:

"And *the* right of way shall be exempt from taxation *within* the territories of the United States."

This is equivalent to saying:

"And the right of way within the territories of the United States shall be exempt from taxation."

It is the right of way which is *within* the territories, as contradistinguished from the right of way within any state, to which the exemption from taxation applies. This is the grammatical and reasonable construction. To carry out our opponent's construction, the language should have been:

"And such right of way granted, aforesaid, shall be exempt from taxation by the territories of the United States."

The reason for our contention is obvious. Congress has supreme power over the territories and may, if it chooses, exempt any sort of property from territorial taxation or territorial regulation, within the principle announced by this court in *The Mormon Church* v. *United States*, 136 U. S., 1. It will be noticed that Congress did not attempt to exempt any part of the right of way which should be located within a state, whether upon public lands or not. Evidently it was considered that, in respect to the state through which the railroad should be built, the right of way, including the superstructure and other property, ought to be subject to the taxing power of the state in which it should be located, that being one of the sovereign and necessary powers inherent in and possessed by the state. A different rule was intended with reference to the territories, over which Congress itself had exclusive control. The language should then be construed according to its natural signification, as it does not take from the territory any inherent power which it possessed.

Again, the right of way exempt within the territories is spoken of as an entirety. Congress could not have intended to exempt merely the right of way located over the public domain, and which was granted by section 2,

when that also, as determined by this court, included the superstructure placed thereon, and at the same time have intended to subject to taxation by the territories, say, half an acre or so between exempted portions, which right of way over such half-acre might have been acquired by purchase or condemnation. To subject such a small strip to the taxing power of the territory would be to authorize the territory to sell such small portion in case of failure to pay taxes thereon, and thereby destroy or disintegrate the railroad in case of such failure; for the power to tax implies the power to destroy.

McCulloch v. *Bank of Maryland*, 4 Wheat., 427.

But it is contended that to permit our construction would be to take out of the taxing or legislative power of the territory property which had theretofore been taxable. This reasoning is not sound, because it must be admitted that the mere strip of land used as right of way is of insignificant value, especially in the territories, and the main value would consist in the superstructure placed thereon by the railroad company. Now, if this court was right in the construction given to the meaning of the right of way as embracing the superstructure, Congress did withdraw from the taxing power of the territory such property of the railroad company as was used in the superstructure upon the right of way located upon the public domain.

Again, the strip of land acquired for use as right of way by the railroad company was not acquired solely for its own purposes, but was acquired in order that it might be used as a post route and military road by the government when necessary. (See section eleven of the act.)

Could it be possible that Congress, which had the supreme power over the territories, intended, when making the exemption from taxation of the right of way, that only a portion of the right of way within the territories should be exempt? In view of the interest in or right to use this road or highway which Congress had secured by section eleven in favor of the United States, it is manifest that Congress meant what it said—that is, the entire right of way within the territories should be exempted from taxation. This is but the ordinary construction to be given to the language used. In view of the great purpose sought to be accomplished and the interest which the government was to have, and the use which it might make of the railroad, this is a case in which a strained construction of language should not be resorted to for the purpose of defeating an immunity. Particularly must this be so as against the contention and the right sought to be exercised, not by Congress, but by one of the territories. In support of this we simply refer to the argument, reasons and authorities in our brief heretofore filed, in respect to the rules of construction applicable to this case.

The words "right of way" in the exemption clause are certainly broad enough to cover everything that would be, in fact or in law, "right of way," unless there is something in the act, section or clause to limit the words to some particular portion of such "right of way," which, as it seems to us, cannot be successfully claimed by anyone.

FIFTH POINT.

Congress intended to make a contract that the right of way in the territories of the United States should be exempt from taxation by the territories, and also exempt from the passage of any act by Congress to tax the same for the benefit of such territories.

Congress knew at the time of the passage of the act that it could, at any time, by its own enactment, tax any property in any of the territories, for the benefit of such territories, and could do this regardless of the revenue laws that the legislatures of such territories might pass. Therefore, to make this exemption of the right of way from taxation of any value, Congress created it by such terms as not only to prohibit the territories themselves from taxing the right of way, but also to prohibit any future Congress from exercising the right of taxation against such right of way for the benefit of the territories or any of them. The making of the contract for exemption from taxation so as to prevent Congress itself, as well as the territories, from taxing, discloses the thought on the part of Congress of making this exemption a thing of more value than the mere exemption of an unimportant strip of land 200 feet in width through these territories.

We have had no opportunity to see the brief prepared by counsel for the Territory under the order of this court of March 6th, and therefore are unable specifically to answer the arguments it may contain.

All of which is respectfully submitted.

C. N. STERRY,
Solicitor for Appellees.

E. D. KENNA,
ROBERT DUNLAP,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, *A. D.*, 1898,

THE TERRITORY OF NEW MEXICO, Appellant, vs. THE UNITED STATES TRUST COMPANY OF NEW YORK, and C. W. SMITH, Receiver of the property of the Atlantic and Pacific Railroad Company, Appellees.	No. 169.

ADDITIONAL BRIEF AND ARGUMENT OF APPELLEE, UNITED STATES TRUST COMPANY, UNDER THE ORDER GRANTING REHEARING.

STATEMENT.

Since filing our brief, under the order made, authorizing the filing of the petition for rehearing, we have received a copy of the brief of appellant, and since the court has granted the rehearing, to be had upon briefs filed, and such additional ones as the parties may choose to file by May 1st, 1899, we respectfully submit the following brief and arguments in addition and supplemental to our former brief.

FIRST POINT.

The intervening petition on pages 30 to 32 of the transcript, and the assessments upon which it is based, on pages 80 to 85 of the transcript, fail to show any valid assessment or levy of taxes upon a valid assessment, which were, or are, any lien on, or charge against, the property or funds in the custody of the receiver in the foreclosure suit commenced by the United States Trust Company against the Atlantic & Pacific Railroad Company, and in which the receiver was appointed on the 10th day of January, 1896.

I.

Counsel for the territory in his brief, discloses that he finds himself in a very embarrassing position concerning the question of the character of the estate obtained by the railroad company, on lands held in private ownership, through the provisions of the 7th section of the act of July 27th, 1866. He admits that under the decision already made in the other cases the "right of way" granted by the second section of the act, created in the railroad company an estate of some character, which at once absorbed into itself the permanent fixtures placed upon such estate, for the purpose of building the railroad thereon.

Under such an admission, the argument of counsel is necesarily based on the proposition, that the "right of way" acquired by the railroad company under the provisions of the seventh section of the act, *is of an entirely different character from that which the company acquired through the grant in the second section of the act.*

If we are right, as to the position of counsel, *it must be conceded* that the estate which the company acquired under the provisions of the seventh section, would not be of an *inferior* character to

that which counsel characterizes as "the unnamed amorphous estate of corporeal quality" [see bottom of page 13 of counsel's brief], acquired by the company under the second section of the act.

Counsel very conclusively argues on pages 12 to 15 of his brief, that the estate the company acquired under the seventh section, was an estate in fee simple, or an estate at least greater than the estate acquired by the grant in the second section.

It necessarily follows, that if the estate acquired for "right of way" under the seventh section is not inferior in character to the estate acquired by the grant under the second section of the act that this court has definitely and conclusively settled, in the decision made in the Bernalillo case, that the superstructure placed upon such estate to make a railroad, instantly became upon its affixture to the land, a part of the estate acquired and owned by the company. If this be true, it follows that each of the assessments upon which the intervening petition is based were illegal, void and unwarranted under the revenue laws of the territory of New Mexico, in that under such laws, no power or authority, is given to separate fixtures that are part of the real estate from the real estate itself, for the purpose of assessment and taxation [see sections 4019, 4044, 4045, 4056 and 4073 of the statutes of New Mexico, set out on pages 16 and 19 of our preceding brief]. If the property attempted to be assessed was part of the real estate to which it was attached, and which was owned by the company, how could it be sold under the provisions of section 4073, and the subsequent provisions of the statute, for the sale of real estate, which are 4074 to 4102, inclusive, and which, in substance, provides for giving notice of the sale, the sale at public auction, execution of certificates, redemption, execution of deeds, etc.

In such a case as the one at bar, the collector to sell the property on which the taxes were levied, would have to sell a horizontal strip embracing simply the actual things named in the

assessment, and upon which the assessment was made, leaving the actual real estate 200 feet in width, to which the property assessed was attached, unsold.

II.

Each of the assessments in controversy are violative of the provisions of subdivision "Third" of section 4019 [former brief, pages 16 and 17] which requires real estate to be described by legal subdivisions, *or by such other description as will identify it.* The only description in any one of these assessments is of the superstructure placed upon 60.7 miles of the right of way [in a total mileage of 93.7 miles in Valencia County] which runs over land "*which was held in private ownership at the time of the grant of said right-of-way to said railroad company.*"

This assessment shows that there was 93.7 miles of right-of-way in Valencia county, and inferentially that 60.7 miles of this was acquired under the seventh section of the act, and that 33 miles was acquired under the second section of the act, without showing by any further description or statement where this 60.7 miles was located with reference to the entire mileage. As this was an assessment of real estate, and had to comply with the statutes, in order to be valid, so that the real estate itself might be sold, we desire to ask this court if it can uphold such an assessment in view of its previous decision in French *v.* Edwards, 13 Wal., 506; Lyon *v.* Alley, 130 U. S., 177; Bird *v.* Ben Lisa, 142 U. S., 664;

See, also,

Lewis *v.* Eastford, 44 Conn., 477;
Thibodaux *v.* Keller, 29 La. Ann., 508;
Green *v.* Walker, 63 Me., 311;
Jefferson *v.* Whipple, 71 Mo., 519;
Wilkins *v.* Tourtellott, 28 Kas., 589;
Greenough *v.* Fulton Coal Co., 74 Pa. St., 486;
Dane *v.* Glennon, 72 Ala., 160;
Salisbury *v.* Shirley, 66 Cal., 223;
State *v.* Franklin, 46 N. J. L., 437;
Sanford *v.* People, 102 Ills., 374.

SECOND POINT.

The intervening petition wholly fails to state a single fact which entitles the territory to collect out of the funds in the hands of the court the taxes sought to be collected on any, or all, of the assessments upon which such intervening petition is based.

Section 4025 and 4026, compiled laws of New Mexico, 1897, [which were in force at the time of these assessments] reads as follows:

§ 4025. "The property of every firm and corporation must be assessed in the county where the property is situated, and in the name of the firm or corporation. Such firm or corporation shall pay tax, and may charge the same to its partners or stockholders, according to their respective share. The owner or holder of stock in any firm or corporation, the entire capital or property of which is assessed, must not be assessed individually for such stock."

§ 4026. "All taxable property shall be listed, assessed and taxed each year, in the name of the owner thereof, on the first day of March."

If there was a compliance with the sections above quoted in the assessment made, such assessment discloses that the property assessed was the property of the Atlantic and Pacific Railroad Company, and if the assessments were properly made of the superstructure separate and apart from the real estate, to which the same was attached, it was, and is because of the correctness of the theory of counsel for appellant, that such property was personal property. The assessment and levy of taxes on personal property of the Atlantic and Pacific Railroad Company for the years preceding the year 1896, would give no claim or right against the receiver, or the trust company to have such taxes paid out of the funds in the custody of the court under the foreclosure proceedings, as the receiver was appointed and took possession of the property under the foreclosure in which the intervention was had, on the 1st day of February, 1896. [Transcript, page 26.]

THIRD POINT.

The right of way and its superstructure acquired by the Atlantic and Pacific Railroad Company under the seventh section, was exempt from taxation in the territory of New Mexico by the provisions of the exemption contained in section two of the act approved July 27th, 1866.

I.

In support of this point we not only refer to the arguments presented on pages 20 to 27, inclusive, of our former brief, filed in this case, and insist that they fully dispose of this question, but also desire to suggest to the court the utter impractibility of any proposition which would hold that *only* the land granted by the government in the second section of the act for "right of way" is exempt under the exemption clause in said section. This act was approved July 27th, 1866, and took effect at once so far as the right of way was concerned. This grant of right of way in the second section *operated upon all lands to which the government had not actually parted with the title.*

Railroad Co. *v.* Alling, 99 U. S., 463;

Railroad Co. *v.* Baldwin, 103 U. S., 428;

Bybee *v.* O. & C. R. R. Co., 139 U. S., 663;

Noble *v.* Union River Logging Co., 147 U. S., 165.

Now suppose, as is actually the fact in the case at bar, that the builders of this railroad from Albuquerque to the west line of the territory assumed that the entire line of "right of way" was acquired through the grant in the second section, on account of all lands over which the right of way was located being public lands, and assume further that no proceedings were ever had under section seven of the act, but that all land was actually acquired through the grant in the second section, or by virtue of the statute of limitations, how would any assessor be able to make an intelligent assessment of any portion of this "right of

way" under the assumption that the portion of the "right of way" acquired by the bar of the statute of limitations, was not exempt from taxation by the exemption in the act? While it does not appear from the record, it is a fact that all of the "right of way" in Valencia county was either acquired through the grant in the second section, or by virtue of the bar of the statute of limitations.

II.

The phrase in the second section "the right of way shall be exempt from taxation *within the territories* of the United States", surely includes all "right of way" in any territory, however acquired. "Right of way" in any territory acquired under the seventh section of the act, whatever its character may be, is certainly nothing but "right of way" within such territory, and therefore falls within the express terms of the exemption clause.

We desire the court to carefully consider our former brief filed in this case, as we attempted there to show very many reasons why the decision rendered in the courts below in this case ought to be confirmed, and hence have not attempted to restate those arguments in this brief, except as to one of them.

CONCLUSION.

If the property assessed was real estate, as this court has determined it was, in the Bernalillo county case, then no valid assessment was ever made under the taxing laws of New Mexico. If the property assessed was personal property, then no right to demand payment for the taxes levied upon the assessment of it out of the funds in the custody of the court has been disclosed at least for the years preceeding 1896.

In any event, and under any circumstances, it must be apparent that the entire "right of way" through Valencia county, was exempt and that such exemption, exempted the entire superstructure from taxation.

All of which is respectfully submitted.

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